Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the religious educational institution exemption in Section 702 of the Civil Rights Act of 1964 should be "narrowly construed" to exclude an educational institution that has a religious purpose and character because a federal court nonetheless deems that institution "primarily secular" rather than "primarily religious."

PARTIES TO THE PROCEEDINGS

Petitioner Kamehameha Schools/Bishop Estate has no parent corporation. It has one non-wholly owned subsidiary, Unison Pacific Investments (U.S.), Ltd., a Bermuda Corporation.

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Kamehameha Schools/Bishop Estate hereby petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 990 F.2d 458 (9th Cir. 1993). The opinion of the United States District Court for the District of Hawaii (App. 20a-43a) entered on August 1, 1991 is reported at 780 F. Supp. 1317 (D. Haw. 1991). The written determination of the Equal Employment Opportunity Commission is not published, and is included in the appendix at 44a-54a. The court of appeals' order denying petitioner's rehearing motion is not published, and is included in the appendix at 55a-56a.

JURISDICTION

The court of appeals rendered its judgment on March 31, 1993. A petition for rehearing was denied and an amended opinion issued on May 10, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), as amended, provides that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), as amended, provides:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

STATEMENT

Title VII of the Civil Rights Act of 1964, as amended, allows an educational institution to obtain a blanket exemption from the statute's ban on religious discrimination in any of three ways. First, under Section 703(e)(2), a school may obtain such an exemption by showing that its "curriculum . . . is directed toward the propagation of a particular religion," *e.g.*, because the school is a seminary or similar institution. 42 U.S.C. § 2000e-2(e)(2)(e). Second, under this same provision, a school may obtain a blanket exemption by demonstrating that it is "owned, supported, controlled, or managed

by a particular religion or by a particular religious corporation, association, or society." *Id.* Third, regardless of ownership or control by a church or religion, Section 702 of the Act allows a school to obtain such an exemption by demonstrating that it is a "religious educational institution." [1] It is this third exemption—which also applies to "religious corporations," "associations," and "societies"—that is at issue here.

In the decision below, the Ninth Circuit essentially nullified this third exemption, at least as to religious schools, by adopting what the court termed a "narrow construction." Specifically, the Ninth Circuit held that even if an educational institution has, in the words of the EEOC, " 'a religious orientation similar to that found in most church-schools,' " App. 43a (citation omitted), Section 702 nevertheless does not protect the school if a federal court deems the institution "primarily secular" rather than "primarily religious." This is a test applied to Section 702 in no other circuit. And under the Ninth Circuit's test, schools that are "primarily religious" will be effectively limited to seminaries or schools owned or controlled by a particular religion, which are fully protected by Section 703(e)(2), and therefore do not need the Section 702 exemption at all. The Ninth Circuit thus has read Section 702's "religious educational institution" exemption out of the statute.

To understand the significance of this decision, it is necessary briefly to review (1) the history and nature of petitioner Kamehameha Schools/Bishop Estate ("Kamehameha" or the "Schools"), (2) the EEOC proceedings that led to the present action, (3) the decision of the district court, and (4) the court of appeals decision.

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[1] In addition, Section 703(e)(1) allows a school (or other employer) to "hire and employ [an] employee[] . . . on the basis of his religion" if the employer can show, on a position-by-position basis, that "religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1).

1. *Kamehameha's Religious Heritage And Practices.* Kamehameha is one of at least 300 religiously oriented schools nationwide that are neither theological seminaries nor institutions directly owned or controlled by a church or religious association.[2] Instead, Kamehameha is operated by a non-profit charitable trust established by the will of Bernice Pauahi Bishop. App. 2a. Her will requires that the trustees be Protestant,[3] and this requirement has been adhered to throughout the Schools' century-long history.

During that period Kamehameha has educated, at minimal cost to the students and their families, tens of thousands of Hawaiian children in an atmosphere permeated by the Protestant faith, in accordance with the wishes expressed in Mrs. Bishop's will. Kamehameha has always referred to itself as a Protestant school. App. 35a. To advance from grade to grade and graduate from the Schools, students must both attend and pass religious education courses each year. App. 28a. Students in kindergarten through eighth grade participate in daily prayer, and the boarding students say prayers before dinner. App. 10a. Religious influence is also present in a variety of other school activities, including the incorporation of prayer before athletic events, other meals, commencement ceremonies, and song festivals. App. 40a-41a n.6. Students are also strongly encouraged to participate in religious organizations. *Id.*

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[2] This approximate tally of religiously oriented schools that are not directly controlled or owned by specific religions relates only to colleges and universities, because data with respect to primary and secondary level educational institutions are not readily available. This figure strongly indicates that an even larger number of such religiously oriented schools at the lower levels, like the Kamehameha Schools, will be affected by the ruling of the court of appeals.

[3] The will appointed named trustees originally, and specified that later trustees shall be "persons of the Protestant religion." Will of Bernice Pauahi Bishop ¶ 14.

Kamehameha is also operated in connection with the Bishop Memorial Church, which is located at the center of campus and is a member of the Hawaii Conference of the United Church of Christ. App. 7a n.7. Boarding students are required to attend chapel each Sunday. App. 40a-41a n.6. And all students in grades 7 through 12 are required to attend a weekly devotional service in the chapel. App. 40a-41a n.6. Although the Bishop Memorial Church does not own the Schools, the Schools and the church are both owned by the same trust and managed by the same trustees.

Consistent with the pervasive Protestant influence over the activities of the Schools that Mrs. Bishop sought to create, her will also required not only that the trustees of Kamehameha be Protestant, but also that the teachers be Protestant. Both of these requirements have been strictly followed throughout the Schools' history of over a century. See App. 9a.

There can be no doubt that Protestant influence pervades all aspects of school life at Kamehameha, and this has been confirmed by myriad observers. The Hawaii Supreme Court in *Murray* v. *Kobayashi*, 431 P.2d 940 (Haw. 1967), noted that Mrs. Bishop's entire will is "permeated with expressions of her interest in the exposition of the Protestant religion" in Hawaii. App. 34a (quoting 431 P.2d at 942). Moreover, " '[i]n recognition of this interest the trustees established the Bishop Memorial Church as an integral part of the Kamehameha Schools and injected religion in the school program.' "[4] *Id.* (quoting 431 P.2d at 942).

Similarly, a planning survey of Kamehameha done in 1961 by the management consulting firm of Booz, Allen, and Hamilton found that the Schools endeavor "to educate their students in a Protestant Christian environment . . . ." The report also noted that "the objectives of the

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[4] This interpretation of a Hawaiian citizen's will by the Hawaii Supreme Court is binding on a federal court. *Roberts* v. *Lewis*, 153 U.S. 367 (1894).

religious services sponsored by [Kamehameha] are to provide a Protestant Christian atmosphere which pervades every aspect of campus life, to encourage worship, to engender an understanding and appreciation of the heritage afforded by Christianity, to provide opportunities for Christian service to others, and to give personal counselling—all for purposes of helping students to shape themselves into persons of good moral character." App. 38a (quoting Kamehameha Schools Planning Survey v.2, p.107; and v.3, p.27 (1961)). And in 1979, the EEOC itself adopted the Hawaii Department of Labor's finding that Kamehameha's Protestant-only requirement was exempted under Section 702. App. 35a.

Most important, perhaps, is how Kamehameha has chosen to define itself over the course of the past one hundred years. As the President of Kamehameha Schools has stated, "[D]aily contact with Protestant role models, prayer before meals, devotionals, required religious courses, the Bishop Memorial Church and Chapel on campus, religious programs of the school, deputation teams, and religious extra-curricular activities all speak to the degree to which religion plays a role at Kamehameha." App. 37a-38a (quoting unrebutted affidavit of Michael Chun, President of Kamehameha Schools). In sum, the Schools have steadfastly promoted the goals set forth by their founder in her will by providing education to school children in a setting that is pervasively Protestant.

2. *The EEOC Proceedings.* This case arose in 1989 when Carole Edgerton, a non-Protestant who had inquired about a teaching position in response to an advertisement, was informed of the Schools' Protestant-only requirement for teachers. App. 2a-3a. Edgerton filed a charge of discrimination with the EEOC. *Id.* Kamehameha's principal defense was that it was a "religious educational institution" under Section 702, and that it was therefore permitted to discriminate on the basis of

religion in its faculty hiring policies.[5] In support of its position, Kamehameha cited a 1979 EEOC determination in which the agency had rejected an earlier challenge to Kamehameha's Protestant-only requirement on the ground that Kamehameha was exempted under Section 702. App. 35a.

Although the Schools' essential characteristics had not changed since the EEOC's earlier determination, the EEOC this time rejected the Schools' Section 702 defense. The agency acknowledged that "[i]t is clear from the evidence submitted during the investigation of this charge that the Schools have a religious orientation that is similar to that found in most church-schools." App. 52a n.8. However, the EEOC opined that "Section 702 . . . must be narrowly construed." App. 46a. The agency then applied that provision as follows:

> [T]he Schools are not churches, or institutions like churches, and are not owned, operated or controlled by a church or religion. Consequently, the Schools do not fit within the paradigm of a "religious" institution contemplated by Congress in creating the 702 exemption to Title VII.

App. 48a (citation omitted). The agency acknowledged that, under this interpretation, the Section 702 exemption would add nothing to the exemption independently provided in Section 703(e)(2). App. 49a n.6. However, the EEOC justified this result on the novel ground that "it would be improper for this Agency to interpret the 702 exemption to provide an educational institution

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[5] Kamehameha also contended that it was entitled to the "bona fide occupational qualification" exemption of Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (on the ground that Mrs. Bishop's will required all Kamehameha teachers to be Protestant), and the "religious curriculum" exemption contained in Section 703(e)(2). The EEOC rejected these arguments (*see* App. 52a, 51a), the district court upheld them (*see* App. 43a, 32a), and the Ninth Circuit rejected them (App. 4a). Kamehameha has elected not to press these arguments before this Court.

with a bigger loophole to Title VII coverage than was contemplated by Congress in 703(e)(2)." *Id.*

3. *The District Court's Decision.* The EEOC filed suit in the United States District Court for the District of Hawaii, alleging that the Schools' conduct violated Title VII's ban on religious discrimination in employment. See 42 U.S.C. § 2000e-2(a). Both parties filed cross-motions for summary judgment, which were limited to the question whether Kamehameha fell within any of the existing statutory exemptions to Title VII's prohibition on religious discrimination. App. 21a. As it had done in its own written determination, the EEOC again argued that a religiously oriented school may not receive an exemption under Section 702 unless the school also falls within Section 703(e)(2). App. 34a n.5.

The district court rejected the EEOC's argument. *Id.* Instead, based upon stipulated and uncontested facts, the district court found that Kamehameha was entitled to a religious educational exemption under Section 702, and therefore granted petitioner's motion for summary judgment.

In analyzing and applying Section 702 to Kamehameha, the court found that Kamehameha "has *a* religious purpose and character," which the court deemed sufficient to invoke the Section 702 exemption. App. 37a (emphasis added). The district court relied for this conclusion upon the following undisputed facts:

> (1) All trustees for the 104-year life of the schools have been Protestant;
>
> (2) Mrs. Bishop desired . . . the children to be instructed in morals by Protestants;
>
> (3) . . . "A review of the record clearly shows that [Kamehameha] and the Bishop Memorial Church are operated by the trustees in connection with one another" [quoting the Hawaii Supreme Court in *Murray* v. *Kobayashi*, 431 P.2d 940, 942 (Haw. 1967)].
>
> * * * *

> (6) [Kamehameha] refers to itself as a Protestant school . . . .
>
> (7) [Kamehameha] is a non-profit institution;
>
> (8) There has been an unbroken chain of over 100 years of mandatory devotional services, religious education requirements, and prayers at [Kamehameha]; and
>
> (9) EEOC found in its determination in the underlying claim that [Kamehameha] has a " 'religious orientation similar to that found in most church-schools' " [citation omitted].

App. 34a-35a. Moreover, the district court expressly found that "if the Protestant-only requirement was not maintained, it would be reasonable to believe that the educational experience would be significantly different." App. 28a. The district court rejected the EEOC's contention that Kamehameha's religious purpose and character were negated by, among other things, the fact that it was "owned, controlled, and supported by a secular estate" rather than a church, and that the Schools provide a "secular" education to their students in addition to religious training. App. 36a.

4. *The Decision Of The Ninth Circuit.* The court of appeals reversed. It began by holding that all of Title VII's "statutory exemptions," including Section 702's religious educational institution exemption, are to be "construe[d] narrowly." App. 4a. The court contended that "Congress's conception of [§ 2000e-1] was not a broad one. All assumed that only those institutions with extremely close ties to organized religion would be covered." App. 5a (quoting *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)). The court, however, cited no support in Title VII's language or legislative history for this argument.[6]

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[6] Indeed, the court claimed that its conclusion did "not depend on an analysis of legislative history." App. 5a n.5.

The court determined that the appropriate way to construe Section 702 narrowly was to employ the "primarily religious/primarily secular" test previously applied in the Ninth Circuit to Section 702's "religious corporation" exemption. App. 5a. Under the Ninth Circuit's test, an organization can claim an exemption under Section 702 only if the court determines that the institution is "*primarily* religious," but not if the court determines it is "primarily secular."

Analyzing the facts found by the district court in light of its legal test derived from the "narrow construction" of Section 702, the court of appeals concluded that "the general picture of the Schools reflects a primarily secular rather than a primarily religious orientation." App. 6a-7a. The court did not dispute any findings of fact upon which the district court had based its conclusion. Rather, the Ninth Circuit's conclusion was based principally upon (a) the fact that "[n]o religious organization has ever controlled or supported the Schools" (App. 7a); (b) the fact that Kamehameha had "explicitly disavowed any effort to convert non-Protestant students" (App. 10a); and (c) the fact that Kamehameha "offer[s] a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective" (App. 10a). Moreover, after carefully reviewing the content of Kamehameha's mandatory religious instruction, the Ninth Circuit dismissed that instruction as consisting of "largely comparative religious studies." App. 12a. The court likewise denigrated all remaining religious characteristics identified by the district court.

REASONS FOR GRANTING THE PETITION

It has been six years since this Court last decided a case involving Section 702's religious exemption; that case was *Corporation of the Presiding Bishop* v. *Amos,* 483 U.S. 327 (1987). There, the exemption faced a challenge from private plaintiffs who sought to have it declared unconstitutional under the Establishment Clause.

The Court rightly rejected that challenge. Here, the exemption faces a more subtle but equally devastating challenge from the EEOC and the Ninth Circuit, both of which seek to limit severely the reach of Section 702 in a manner that was not intended by Congress.

The decision below is fundamentally wrong as a matter of law. But the decision is not only wrong; it also warrants review for both its legal and practical implications. First, in the decision below, the Ninth Circuit has placed itself squarely in conflict with the Third and Fifth Circuits on an issue fundamental to the proper interpretation of Section 702: whether the "religious educational institution" exemption, and Section 702 generally, should be interpreted "narrowly" or "broadly." The importance of this conflict over the appropriate rule of construction is starkly illustrated by the fact that, in this case, the Ninth Circuit's "narrow" construction essentially nullifies Section 702's "religious educational institution" exemption by limiting it to those schools that independently qualify for an exemption under Section 703(e)(2).

Second, the Ninth Circuit's "primarily religious/primarily secular" test requires the EEOC and the courts to make the very kinds of intrusive, "entangling" inquiries into religious matters that this Court has said should be avoided whenever possible, and which, as this Court noted in *Amos,* the framers of Section 702 specifically sought to avoid. See 483 U.S. at 339. Over time, this ruling will ensure that such schools—which, at the post-secondary level,[7] number at least 28 in the Ninth Circuit and 300 nationwide—either will act to increase the amount of religious activity within the schools solely in order to comply with a court's "primarily religious" requirement, or, conversely, will completely lose their religious character as Title VII operates to eliminate all religious preferences within the institutions. Either way,

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[7] *See supra* note 2.

the religious nature of a private educational institution will be dictated more by vague federal judicial standards than by the school's legitimate desire to define its own mission. Review by this Court therefore is required to ensure that Section 702 is not used as a vehicle for judicial supervision of religion in private schools, the ultimate effect of which would be to transform the very nature of such educational institutions.[8]

1. The linchpin of the Ninth Circuit's decision—as well as that of the EEOC—was the holding that the exemptions contained in Section 702 must be "construe[d] narrowly." App. 4a. It was on this basis that the court held that an institution must be "primarily religious" and not just "religious" in order to invoke the protection of Section 702. App. 5a. And it was on this basis that the Ninth Circuit disagreed with the district court's analysis of the facts: In contrast to the district court, the approach of the Ninth Circuit required it to "evaluat[e] the facts of this case in light of Congress' intention as to the [narrow] scope of the exemption." *Id.* In short, it was the Ninth Circuit's "narrow construction" of Section 702 that led it to adopt its "primarily religious/primarily secular" test, which in turn led the court to conclude that Kamehameha cannot invoke Section 702's exemption here.

For the same reason, it is clear that the outcome would have been different in either the Third or the Fifth Circuit, both of which have squarely held that Section 702 should be construed "broadly." In *Little* v. *Wuerl*, 929 F.2d 944 (3d Cir. 1991), for example, the Third Circuit

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[8] Indeed, the Ninth Circuit's ruling will require Kamehameha to make fundamental changes in its operations. Therefore, the proper interpretation of Section 702 is an issue that "should receive the attention of this Court before . . . a national institution as venerable as the [Kamehameha Schools] is compelled to transform itself" and to abandon its essential character maintained since the Bishop Estate was probated more than one hundred years ago. *Virginia Military Inst.* v. *United States*, 113 S. Ct. 2431 (1993) (op. of Scalia, J.).

held that Section 702 protects a decision of a Catholic school to discriminate against a non-Catholic, not because of her membership in another faith, but "because her conduct does not conform to Catholic mores." *Id.* at 945. The Third Circuit reviewed the legislative history of the religion-based exemptions to Title VII, and concluded that "those exemptions reflect a decision by Congress . . . [that religious organizations should] be free from government intervention." *Id.* at 951. Specifically, the court reasoned:

> [We] are . . . persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, *we read the exemption broadly.*

Id. at 951 (emphasis added). In contrast, the decisions of the Ninth Circuit and the EEOC have now made it impossible for educational institutions that are not owned or controlled by a church or organization of churches to "create and maintain communities composed solely of individuals faithful to their doctrinal practices," unless a federal court independently concludes that the institution is "primarily religious."

Similarly, in *EEOC* v. *Mississippi College,* 626 F.2d 477 (5th Cir. 1980), the Fifth Circuit held that "the exemption granted to religious institutions by § 702 . . . *must be construed broadly* to exclude from the scope of the act any employment decision made by a religious institution on the basis of religious discrimination." *Id.* at 487. Accordingly, the Fifth Circuit held that a finding that Section 702 applies "deprives the EEOC of jurisdiction to investigate further to determine whether the reli-

gious discrimination was a pretext for some other form of discrimination." *Id.* at 485. The court further noted that "[t]his interpretation of § 702 is required to avoid the conflicts that would result between the rights guaranteed by the religion clauses of the first amendment and the EEOC's exercise of jurisdiction over religious educational institutions." *Id.* (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-02 (1979)).

Although *Little* and *Mississippi College* involved the interpretation of different phrases in Section 702 than the phrase ("religious educational institution") specifically at issue here, the conflict could hardly be more stark: The decision below held that the entire provision must be "construe[d] narrowly," while both *Little* and *Mississippi College* expressly held that the entire provision must be "broadly construed." Given the fact that the Ninth Circuit did not disagree with the district court's findings of fact, there can be little doubt that a "broad construction" of Section 702 by the Ninth Circuit would have compelled a conclusion on these facts that Kamehameha is indeed a "religious" institution. Certainly, if it had applied the standard used in the Third and Fifth Circuits, the court of appeals would never have had to engage in its subjective, intrusive analysis of Kamehameha's religious characteristics to determine whether Kamehameha is entitled to the protections of Section 702.

The Ninth Circuit's view that Section 702 must be "narrowly construed" is fundamentally wrong in light of this Court's consistent teaching that, especially where issues of religious freedom are concerned, statutes should be construed to avoid " 'serious doubt of [their] constitutionality.' " *NLRB* v. *Catholic Bishop, supra*, 440 U.S. at 500 (quoting *Machinists* v. *Street*, 367 U.S. 740, 749 (1961)). See also *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). As the Fifth Circuit noted in *Mississippi College*, a narrow interpretation of Section 702's religious exemption

heightens the risk of a conflict between religious freedom and enforcement of Title VII, while a broad construction, such as that endorsed by the Third and Fifth Circuits, reduces this risk. And a broad construction also more effectively promotes Congress' intent to accommodate religious preferences by institutions that are religious in nature. See *Amos*, 483 U.S. at 335 (recognizing that Section 702's purpose was "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"). The Ninth Circuit's "narrow construction" is especially troubling because it affects *all* of the religious exemptions provided by Section 702, not just the "educational institution" exemption.

Moreover, the erroneousness of the Ninth Circuit's "narrow construction" canon is made plain in light of the harm that interpretation does to the entire statutory scheme. Specifically, the court's opinion indicates that, to pass the "primarily religious" test, an institution would have to be either (a) owned or controlled by a church or religion, or (b) the functional equivalent of a theological seminary. But in that event, the school could simply claim one of the separate exemptions in Section 703(e)(2). There would be no need to invoke Section 702.

For all of these reasons, this Court should grant certiorari to resolve the fundamental conflict among the circuits over the appropriate rule of construction in interpreting Section 702.

2. The decision below also warrants this Court's review because the test that the Ninth Circuit adopted as a result of its narrow construction of Section 702—its "primarily religious/primarily secular" test—requires, for any exemption under Section 702, that courts and the EEOC make extremely intrusive inquiries into religious matters. These are precisely the kinds of inquiries that this Court's decisions have consistently cautioned against, and which,

as the Third and Fifth Circuits recognized, Section 702 was designed to avoid. By its terms, the Ninth Circuit's test requires two distinct inquiries, each of which is constitutionally problematic: first, " '[a]ll significant religious and secular characteristics' " of the institution and its program must be identified; second, these characteristics " 'must be weighed to determine whether the corporation's purpose and character are primarily religious' " or secular. App. 5a (citation omitted).

The first inquiry plainly runs afoul of this Court's consistent teaching that "determining whether an activity is religious or secular . . . results in considerable ongoing government entanglement" with matters of religion. *Amos, supra*, 483 U.S. at 343 (Brennan, J., concurring in the judgment) (citing *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971)). Accordingly, this Court has frequently construed statutes to avoid the necessity for such inquiries, and has required other courts and public officials to avoid them as well. *E.g., Catholic Bishop, supra*, 440 U.S. at 496 (quoting with approval statement by court of appeals that "factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems"); *Hernandez* v. *Commissioner*, 490 U.S. 680, 694 (1989) (construing provision of Internal Revenue Code to avoid requiring "the IRS and reviewing courts to differentiate 'religious' benefits from 'secular' ones"); *Aguilar* v. *Felton*, 473 U.S. 402, 413 (1985) (invalidating federal aid program to religious schools in part because program presented entanglement problems inherent in government evaluation of "subtle or overt presence of religious matter" in the classes); *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment").[9] The basis for these decisions was well

[9] *See also Widmar* v. *Vincent*, 454 U.S. 263, 272 n.11 (1981) (noting that school's decision not to exclude religious worship and

stated in *Gillette* v. *United States*: " 'the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement' in determining the character of [religious] beliefs and affiliations, thus 'entangl[ing] government in difficult classifications of what is or is not religious.' " 401 U.S. 437, 457 (1971) (quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 698-99 (1970)).

Indeed, the first step of the Ninth Circuit's test not only violates these key judicial principles, but also is contrary to the congressional intent underlying Section 702, as interpreted in *Amos*. As Justice O'Connor explained, Section 702 represents "a government decision to lift from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining from discriminating on the basis of the religion." 483 U.S. at 348-49 (O'Connor, J., concurring in the judgment). And the majority opinion in *Amos* stated that one of the purposes of that provision was to "avoid[] the kind of intrusive inquiry into religious belief that the District Court engaged in in this case." *Id.* at 339. Like the court of appeals here, the district court in *Amos* had undertaken an exhaustive inquiry into whether certain practices and functions of a gymnasium owned and operated by the Church of Jesus Christ of Latter-day Saints were "religious" or "secular." See *id.* at 331-32 The Ninth Circuit's requirement that a reviewing court engage in a searching analysis to determine which aspects of an institution are religious and which are secular thus violates this Court's fundamental teachings.

The second step of the Ninth Circuit's analysis—weighing religious and secular features to determine whether the institution is "primarily religious"—is equally and independently inappropriate under *Catholic Bishop*.

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speech from campus facilities was justified by, among other things, the school's legitimate desire to avoid the entanglement entailed in determining which activities and speech are "religious").

There, in an effort to avoid constitutional difficulties, this Court interpreted the NLRA not to extend the jurisdiction of the NLRB to church-operated schools. In so doing, the Court rejected the NLRB's attempted distinction between schools that were "completely religious" and those that were merely "religiously associated." See 440 U.S. at 499. The Court observed that this distinction was itself an admission by the NLRB that its policy constituted "some degree of entanglement" in religious affairs. *Id.* And the Court quoted with approval the following statement by the court of appeals: "The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition." *Id.* at 495.

The same is true of the Ninth Circuit's attempt to weigh the institution's "religious" and "secular" features against one another to determine whether the institution is "primarily religious" or "primarily secular." Indeed, the intrusiveness of the Ninth Circuit's test is demonstrated by the court's analysis of the district court's findings of fact concerning the Kamehameha Schools. For example, in order to conclude that Kamehameha is "primarily secular," the court found it necessary (a) to denigrate Kamehameha's religious instruction as consisting of "largely comparative religious studies" (App. 12a); (b) to question Kamehameha's commitment to its Protestant mission by virtue of the Schools' lack of overt proselytization toward non-Protestant students [10] (App. 10a) and its failure to police the religious orthodoxy and conduct of its faculty (App. 9a); and (c) generally to minimize the significance and importance of Kamehameha's "religious characteristics" (App. 12a). Any "test" that requires such value-laden, patronizing judgments about an institution's religious prac-

[10] The court of appeals seemed oblivious to the implication of its argument that in order for Kamehameha to obtain the fundamental protection intended by Title VII, it must engage in greater efforts at proselytization. It is difficult to imagine a more jarring entanglement of church and state than judicially encouraging a private school to adopt a program of converting students to Protestantism.

tices plainly fosters an intolerable degree of entanglement between government and religion.

In sum, this Court should grant certiorari to ensure that the lower federal courts do not improperly become embroiled in entangling disputes about the quality and scope of religious instruction and practices of institutions seeking to claim an exemption under Section 702. Because such entanglements are avoided by the legal standards followed in the Third and Fifth Circuits, but are inevitable under the holding of the Ninth Circuit in this case, review by this Court is essential to ensure uniformity in the interpretation of this vital provision of Title VII.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 91-16586

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii

Argued and Submitted Nov. 5, 1992

Decided March 31, 1993

As Amended on Denial of Rehearing
May 10, 1993

Samuel A. Marcosson, E.E.O.C., Washington, DC, for plaintiff-appellant.

James Kawashima and Cynthia Winegar, Watanabe, Ing & Kawashima, Honolulu, HI, for defendant-appellee.

Before BROWNING, NORRIS and REINHARDT, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

I. *Overview.*

Bernice Pauahi Bishop was a member of the Hawaiian royal family and, at the time of her death in 1884, the largest landowner in Hawaii. Mrs. Bishop's will provided that the bulk of her estate should be placed in a charitable trust "to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools." Mrs. Bishop's will also directed that "the teachers of said schools shall forever be persons of the Protestant religion." [1]

Carole Edgerton, who is not a Protestant, contacted the Schools to apply for an advertised position as a substitute French teacher. Edgerton was informed of the Protestant-only requirement and filed a charge of religious

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[1] The provision reads:

> I give, devise and bequeath all of the rest, residue and remainder of my estate . . . unto the trustees below named . . . to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. . . . I direct my trustees . . . to expend the annual income in the maintenance of said schools . . . and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood. . . . I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. . . . I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils. . . . I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice be restricted to persons of any particular sect of Protestants.

discrimination with EEOC. EEOC attempted conciliation, but the Schools informed the Commission they were bound by Mrs. Bishop's will.

EEOC filed suit, alleging religious discrimination in employment in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).[2] The Schools conceded Mrs. Bishop's will requires discrimination in employment contrary to § 2000e-2(a)(1), but sought to bring themselves within three exemptions provided elsewhere in the Act: (1) § 2000e-1, which provides that the equal employment provisions of the Act do not apply to employment by a "religious . . . educational institution" of individuals of a particular religion to carry on its activities; (2) § 2000e-2(e)(1), which provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [] religion" if religion is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise;" and (3) § 2000e-2(e)(2), which provides that "it shall not be an unlawful employment practice for a school . . . to hire and employ employees of a particular religion . . . if the curriculum of such school . . . is directed toward the propagation of a particular religion."

The parties agreed to litigate the applicability of the three exceptions before considering the merits of Edgerton's claim. EEOC and the Schools filed cross-motions for summary judgment. The district court found the Schools exempt on all three grounds. *EEOC v. Kamehameha Schools/Bishop Estate*, 780 F.Supp. 1317 (D. Haw.1991).

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[2] 42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

Ordinarily, "[w]e review the district court's grant of summary judgment *de novo.*" *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 613 (9th Cir.1988). However, here we are reviewing, at least in part, conclusions of ultimate fact reached by a district court when granting summary judgment in a non-jury case. We need not decide whether a different standard of review applies with respect to such conclusions; the result would be the same whether we applied a *de novo* or clearly erroneous standard.

We construe the statutory exemptions narrowly, *Korherr v. Bumb,* 262 F.2d 157, 162 (9th Cir.1958), and the Schools bear the burden of proving they are exempt, *see United States v. First City Nat'l Bank,* 386 U.S. 361, 366, 87 S.Ct. 1088, 1092, 18 L.Ed.2d 151 (1967) (party seeking benefit of exemption from statute bears burden of proof); *EEOC v. Boeing Co.,* 843 F.2d 1213, 1214 (9th Cir.1988) (party seeking benefit of bona fide occupational qualification exception bears burden of proof).

We conclude the Schools failed to establish their entitlement to any of the three exemptions claimed, and reverse.

II. *Exemption for Religious Educational Institutions.*

The district court weighed the religious characteristics of the Schools against their secular characteristics and concluded the Schools were exempt under § 2000e-1 as religious educational institutions because the purpose and character of the School is primarily religious.[3] 780 F.

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[3] 42 U.S.C. § 2000e-1 reads:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution,* or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. (emphasis added)

Supp. at 1324-26. In applying § 2000e-1 the district court adopted the approach approved by this court in *Townley*, 859 F.2d at 618, of weighing "[a]ll significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious." We reaffirm that approach. We differ from the district court only in evaluating the facts of this case in light of Congress' intention as to the scope of the exemption for religious organizations.

We stated in *Townley* that § 2000e-1 does not exempt an institution that is "merely 'affiliated' with a religious organization." *Id.* at 617. We also observed, "Congress's conception of the scope of [§ 2000e-1] was not a broad one. All assumed that only those institutions with extremely close ties to organized religion would be covered. Churches, and entities similar to churches, were the paradigm." *Id.* at 618.[4] We then held that, in determining whether an institution falls within the limited exemption for religious institutions under § 2000e-1, "each case must turn on its own facts. All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when this is the case will the corporation be able to avail itself of the exemption." 859 F.2d at 618. "Our inquiry here," we said, "is to determine whether the 'general picture' of the institution is primarily religious or secular." *Id.* at 619 n. 14.[5]

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[4] Specific exemptions for schools, owned, supported, controlled, or managed by a particular religion, or whose curricula are dedicated toward the propagation of a particular religion were included in the original statute because of the perceived narrowness of the exemption for religious corporations in § 2000e-1. *See* 42 U.S.C. § 2000e-2(e)(2); *Townley*, 859 F.2d at 617.

[5] *Townley* relied in part on an examination of the legislative history of the original version of § 2000e-1, which contained separate exclusions for (1) religious discrimination relating to the religious activities of a religious corporation, association, or society,

The ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools are either essentially secular, or neutral as far as religion is concerned,[6] and we conclude the general picture of

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and (2) discrimination on any basis relating to the educational activities of an educational institution. *Townley* did not discuss the legislative history of the 1972 amendments to § 2000e-1, which eliminated the separate exemption for educational institutions, added "religious . . . educational institutions" to the list of exempt religious organizations, and expanded the religious exemption to include employees engaged in non-religious activities. However, nothing in the 1972 legislative history causes us to question the approach the court adopted in *Townley*. These materials suggest only that Congress felt strongly that the exemption that had been available to all educational institutions should be narrowed to religious discrimination by religious educational institutions, but that religious institutions, including religious schools, should be allowed to discriminate on the basis of religion in all their activities. *See, e.g.*, H.Rep. No. 238, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155, and Bureau of National Affairs, *The Equal Employment Opportunity Act of 1972* 155, 173 (1973); S.Rep. No. 415, 92nd Cong., 1st Sess. (1971), *Equal Employment Opportunity* at 225, 235-36; 118 Cong. Rec. 946 (Jan. 24, 1972) (statement of Sen. Allen, sponsor of amendment to allow religious organizations to discriminate on basis of religion in all their activities), *Equal Employment Opportunity* at 335; *id.* at 4941 (Feb. 22, 1972) (section by section analysis of Senate bill by Sen. Williams, sponsor of the bill), *Equal Employment Opportunity* at 314. It would frustrate this purpose in part to allow educational institutions with limited religious ties to gain exemption as "religious educational institutions."

In any event, the test the court adopted in *Townley* does not depend on an analysis of legislative history. Although the statute does not define the term "religious educational institution," it is clear from its context that, at least where the school is not owned by a church, the courts must determine in each case whether a particular educational institution is a religious organization. Therefore the case by case inquiry described in the text is the appropriate method for determining whether § 2000e-1 applies to the Schools.

[6] The record does not disclose many details about the administration of the Schools. Mrs. Bishop's will requires that the trustees be Protestants, and grants the power of appointing them to the justices of the Hawaii Supreme Court. There is no requirement that other administrative positions be filled by Protestants, and there is nothing

the Schools reflects a primarily secular rather than a primarily religious orientation.

1. *Ownership and Affiliation*—No religious organization has ever controlled or supported the Schools, and the Schools are not affiliated with any denomination of Protestants or with any organization or association of religious schools.[7] The Schools are a part of the Bishop Trust, which is a large and overwhelmingly secular business. Recent annual reports for the Bishop Estate make no mention of religion. Recent annual reports by the

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in the record to indicate that the Schools' administration reflects a Protestant perspective, or has organized the Schools so as to promote Protestant beliefs. Indeed, the record reveals recent generations of administrators have shifted the focus of the Schools away from promoting religion.

[7] The Schools maintain a cooperative relationship with the Bishop Memorial Church, which receives financial support from the Bishop Estate and is a member of the Hawaii Conference of the United Church of Christ. However, the Schools themselves are not affiliated with the Church of Christ, and the parties stipulated that no Protestant denomination, including the Church of Christ, "owns, supports, controls or manages, in whole or significant part, the Bishop Estate or the Kamehameha Schools."

In view of the narrow reach of the § 2000e-1 exemption, it is not surprising that we have found no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church. *See Little v. Wuerl*, 929 F.2d 944 (3d Cir.1991) (parochial school operated by parish); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir.1986) (school wholly owned and operated by Assembly of God Church); *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir.1985) (sex discrimination by a church); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir.1982) (affiliated with and overseen by Seventh Day Adventist Church; published only religious materials); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. Unit A 1981) (owned and operated by Southern Baptist Convention); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir.1980) (owned and operated by Mississippi Baptist Convention); *see also Fike v. United Methodist Children's Home of Va., Inc.*, 547 F.Supp. 286 (E.D.Va. 1982) (exemption does not apply because the home had abandoned its sectarian orientation and become a secular organization even though it was affiliated with the Methodist Church).

Schools to the trustees mention religion only as a form of "ancillary support." [8]

2. *Purpose*—In the advertisement for a substitute French teacher that gave rise to this litigation, the Schools described themselves as "Protestant." However, the record reveals the purpose and emphasis of the Schools have shifted over the years from providing religious instruction to equipping students with ethical principles that will enable them to make their own moral judgments. A 1955 School Survey Report lauded the "aim of developing in the students an attitude of worship and reverence." By 1961, the Schools' Introductory Pamphlet described religion as "a powerful influence for the stabilizing of personality," and asserted religious education at the Schools "seeks to provide an atmosphere in which young people accept as their own the finest ideals of conduct; and in cases where problems have arisen, to show moral and spiritual standards by which the students can set up inward guidance to correct their problems." The 1989-90 Course Catalog states each student "will be expected to develop to the best of his or her ability, skills needed to relate positively to self and others, maintain health, continue learning, enrich existence and participate in contemporary society for a rewarding and productive life." Students should "[d]efine a system of values which reflects positive feelings about

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[8] Because the Schools are chartered as a nonprofit educational institution, not as a religious organization, EEOC argues the Schools represent themselves as secular to receive federal funding for off-campus programs. Congress apparently did not intend that an institution's charter should carry much weight in determining whether an institution is religious. *See* 110 Cong.Rec. 2585 (Feb. 8, 1964) (statement of Rep. Purcell) ("most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education"), *reprinted in* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* 3197 (1968); *see also Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 358 (7th Cir.1986) (Posner, J., concurring).

self and others and awareness of the rights and responsibilities of the individual within society." [9]

3. *Faculty*—The Schools have consistently adhered to the Protestant-only requirement for on-campus teachers, although there is no religious requirement for teachers in off-campus programs. Until 1988, the Schools required prospective teachers to present a baptismal record or letter of membership reflecting affiliation with a Protestant church, but now require only that teachers certify their "membership in the Protestant religion." The Schools have never required their teachers to maintain active membership in a church, and do not inquire into the substance of a teacher's beliefs or the extent to which teachers integrate those beliefs into their work. Of the two hundred and fifty full-time on-campus faculty members, only three, including the Chaplain, have specific religious teaching duties. The Chaplain teaches religious education and serves as pastor of the Bishop Memorial Church, which is located on campus in a structure owned by the Schools. With the exception of religious education, the Chaplain has no authority over the curriculum.

4. *Student Body*—The Schools enroll more than 3,000 boarding and day students in kindergarten through twelfth grade; more than two-thirds of whom attend grades seven through twelve. The Schools operate off-campus programs for more than 16,000 additional students and administer community outreach programs for another 20,000 Hawaiians. The Schools do not consider the religious affiliation of prospective students on or off campus, or of the persons participating in outreach programs. Less than one-third of the "on-campus" students are Protestants.

5. *Student Activities*—Students participate in a wide variety of activities, including interscholastic athletics, canoe and weightlifting clubs, the Future Secretaries As-

[9] We discuss the purpose of the Schools in further detail in section IV, *infra*.

sociation, and French Club. As at public and private schools across the nation, students may participate in Bible studies, or become members of the Fellowship of Christian Athletes and Young Life (an inspirational society for high school students).

Some official school activities have religious overtones. Teachers in kindergarten through eighth grade lead their classes in a daily prayer, and all boarders say grace before dinner. Athletic teams pray before games, and the School's daily bulletin usually reprints a Bible verse. The Bishop Memorial Church holds services every Sunday during the school year which all boarding students must attend (however, no students and only nineteen of faculty were members of the church during the 1988-89 school year). The Chaplain and the church coordinate "deputation teams" of students from the Schools who lead services several times a year on other islands, although the number of students and the number of visits has decreased over the years. Other mandatory school functions—such as Founder's Day, Baccalaureate, and Graduation—include prayer and hymns in addition to celebrations of Hawaiian culture. Another mandatory function—the Song Contest—seeks "to build up the repertoire of the best in Hawaiian music for the cultural heritage of any student who attends Kamehameha."

6. *Curriculum*—The Schools describe themselves as "a comprehensive school" with "programs in vocational, business, and college preparatory fields." They offer a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective. No effort is made to instruct students in Protestant doctrine, and the Schools have explicitly disavowed any effort to convert non-Protestant students. However, the Schools require each student to fulfill a limited religious education requirement, as described below.

Religious instruction in kindergarten through sixth grade is provided by a religious education teacher and

consists of Bible stories, religious songs, and prayer for 15-30 minutes once a week for one semester. The present teacher describes her work as "an important opportunity to expose children to the Christian faith. The emphasis is not on any 'religion' but to teach the basic truths about how God and through his son Jesus Christ teaches us how to live a joyous and fulfilling life."

Religious education in the upper grades exposes students to the comparative study of religions, and to the place religion has held in Hawaiian culture and history. Seventh and eighth graders spend 10-14 hours a year in religious education classes. The single course offered to seventh grade students is described as involving an examination of "The Nature of 'God,'" "The Nature of Man," and "The Nature of Religion." The course description defines "God" as "the center, focus and object of any belief system, whether person, idea or spirit," and defines "religion" as "a structure that attempts to overcome the separation between Man and 'God,' and to teach man how this can be achieved." The eighth grade course explores the historical development and beliefs of "Hinduism, Buddhism, Judaism, Christianity and Islam."

High school students must complete the requirements of the "Ekalesia" program, which includes coursework and mandatory attendance at devotional services every other week.[10] In 1988-89, the course included study of "the Kumulipo, the Hawaiian creation chant, . . . [with] a comparative look at the creation chants of other religions," and an "historical study approach to three major Christian faiths [Congregationalism, Catholicism, and the Church of Jesus Christ of Latter-Day Saints] that have impacted on the Hawaiian people and the Hawaiian society today." In 1987-88 students studied "the Hawaiian

[10] In 1988-89, students were expected to complete one quarter of Ekalesia coursework each year. The Schools modified the coursework component in 1989-90 so that only freshmen were required to complete one quarter of coursework, although all students were still required to attend devotions. The record does not disclose the form or content of the devotional services.

and Christian heritage" of the Schools, and examined "the Congregational missionaries and their impact upon the life and culture of the Hawaiian Kingdom." In addition to "Ekalesia," the Schools offer high school students an elective class on the Bible as literature.

* * * *

In sum, the religious characteristics of the Schools consist of minimal, largely comparative religious studies, scheduled prayers and services, quotation of Bible verses in a school publication, and the employment of nominally Protestant teachers for secular subjects. References to Bible verses, comparative religious education, and even prayers and services are common at private schools and cannot suffice to exempt such schools from § 2000e-1; the addition of nominally Protestant teachers does not alter this conclusion. We conclude the Schools are an essentially secular institution operating within an historical tradition that includes Protestantism, and that the Schools' purpose and character is primarily secular, not primarily religious.[11]

III. *Religious Curriculum Exemption*

The curriculum exemption in 42 U.S.C. § 2000e-2(e)(2) provides:

> it shall not be an unlawful employment practice for a school . . . to hire and employ employees of a particular religion . . . if the curriculum of such school . . . is directed toward the propagation of a particular religion.

The district court ruled the Schools satisfied the requirements of this section because " 'religion . . . is an integral part of the child's daily life' " at the Schools. 780 F. Supp. at 1327 (quoting EEOC Decision 75-186 (1975), *reprinted in* 1983 EEOC Decisions ¶ 6553, at 4356).

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[11] The Schools contend we should consider prior decisions by EEOC regional offices not to charge the Schools with religious discrimination. However, the Schools concede these decisions do not estop EEOC, and there is no indication the regional offices had the benefit of the record compiled during this litigation.

We turn first to the language of § 2000e-2(e)(2). The statute does not define "propagate" or "curriculum," but in the context of § 2000e-2(e)(2) and in light of their ordinary meanings, "propagate" carries at least the general meaning of spreading or instilling particular religious values, while "curriculum" is limited to coursework and required school activities.[12]

Sec. 2000e-2(e)(2) was added to the statute by floor amendment; its legislative history is limited and does not change our understanding of the meaning of the term "religious curriculum." Representative Purcell offered the amendment and stated it was "limited to church affiliated colleges and universities, part of whose mission . . . is to propagate the belief of the denomination that is supporting that educational institution." 110 Cong.Rec. 2585-86 (Feb. 8, 1964), *reprinted in* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* 3198 (1968). Representative Roush declared such a school "should have the right to compel the individuals it employs to adhere to its beliefs, for that [school] exists to propagate and to extend to the people with whom it has influence its convictions and beliefs." *Id.* at 2587, *Legislative History* at 3201. Representative Edmondson indicated the exemption was intended to apply to "a college that is dedicated primarily to the propagation of its faith." *Id.* at 2590, *Legislative History* at 3206. Although these comments do not address the meaning or scope of the curriculum exemption directly, they are consistent with our conclusion that Congress did not anticipate schools that disavow any effort to instill particular

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[12] Webster's Ninth New Collegiate Dictionary (1990) defines "curriculum" as "the courses offered by an educational institution" or "a set of courses constituting an area of specialization." The Oxford English Dictionary (2d ed. 1989) defines it as "a regular course of study or training, as at a school or university." Webster's defines "propagate" as, "to cause to spread out and affect a greater number or greater area." The Oxford English Dictionary defines it as, "To extend . . . To spread from person to person, or from place to place; to disseminate, diffuse."

religious beliefs in their students would come within the exemption.

There is no case law on the curriculum exemption. EEOC has interpreted the provision in only one ruling, EEOC decision 75-186, *reprinted in* 1983 EEOC Decisions ¶ 6553. This decision rested primarily on the ground the school involved was wholly owned, supported, controlled, and managed by a church and therefore was expressly exempt under § 2000e-2(e)(2) whether or not it also fell within the curriculum exemption.[13] The opinion's limited references to the curriculum exemption are not inconsistent with our own understanding that application of this exemption is to be determined by an essentially fact-based inquiry into the extent to which a school's curriculum reflects an effort to spread and inculcate particular religious beliefs.

As we have noted, the curriculum of the Schools has little to do with propagating Protestantism, especially in grades 7-12. Seventh and eighth grade students study the nature of religious belief and the tenets of major faiths, and high school students take a one quarter course exploring the interrelationship of western religions and Hawaiian culture, but efforts to propagate Protestantism are not evident in this or any other coursework or in required activities of the Schools. Courses *about* religion and a general effort to teach good values do not constitute a curriculum that propagates religion, especially in view of the Schools' express disclaimer of any effort to convert their non-Protestant students. The Schools' publications demonstrate religion is more a part of the general tradition of the Schools than a part of their mission, and serves primarily as a means for advancing moral values in the context of a general education.

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[13] 42 U.S.C. § 2000e-2(e)(2) also provides an exemption for religious discrimination by an educational institution that is "in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society." The Schools do not contend they come within this exemption.

IV. *Bona Fide Occupational Qualification.*

The district court concluded that adherence to the Protestant faith was a bona fide occupational requirement for teaching at the Schools and therefore the Schools were exempt under § 2000e-2(e)(1).[14]

EEOC and the Schools stipulated there is nothing "specific about the subject matter of any given teacher position . . . that would make a teacher being Protestant a bona fide occupational qualification" [BFOQ].[15] EEOC claims this stipulation is dispositive in light of the holding in *U.A.W. v. Johnson Controls, Inc.*, —— U.S. ——, 111 S.Ct. 1196, 113 L.Ed2d 158 (1991), that to qualify as a BFOQ a discriminatory job qualification must "affect an employee's ability to do the job," and "must relate to the 'essence' or to the 'central mission of the employer's business.'" *Id.* —— U.S. at ——, 111 S.Ct. at 1205 (citations omitted). The Protestant-only requirement,

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[14] 42 U.S.C. § 2000e-2(e)(1) reads in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [] religion . . . in those certain circumstances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

[15] The stipulation reads:

> [The Schools] contend[] that the Will of Mrs. Bishop by its language creates a bona fide occupational qualification for all teachers to be of the Protestant religion in order that there be a Protestant presence at Kamehameha Schools. [The Schools are] not contending that, apart from their status as teachers generally, there is anything specific about the subject matter of any given teacher position (such as English, science, mathematics) . . . that would make a teacher being Protestant a bona fide occupational qualification within the meaning of this exemption.

EEOC concedes that being Protestant is a bona fide occupational qualification for the Chaplain, Associate Chaplain, and religious education teachers.

EEOC argues, has no relationship to a teacher's ability to perform the job of teaching secular subjects—in this case, the French language.

The district court held the requirement related to the teachers' ability to perform their job because "the essence or central mission of [the Schools] is to provide native Hawaiians with an education from the Protestant point of view . . . . Similarly, the essence or central mission of the teachers' jobs is to provide that viewpoint." 780 F.Supp. at 1323. The district court defined the central mission of the Schools too narrowly. The record demonstrates the Schools have embraced a broad mandate to help native Hawaiians "participate in contemporary society for a rewarding and productive life" by providing a solid education in traditional secular subjects, instruction in Hawaiian culture and history, and the moral guidance necessary to help students "[d]efine a system of values." [16] The requirement of Protestant affiliation in a teacher's past is largely irrelevant to this mission. There is no basis in the record for concluding a nominally Protestant teacher will provide superior instruction or serve as a better moral guide to students. *See Johnson Controls*, —— U.S. at ——, 111 S.Ct. at 1205 (employer must show "a high correlation" between a qualification and ability to perform job functions).

Except for the Schools' religious education teachers (as to whom Protestant affiliation is conceded to be a BFOQ), teachers at the Schools provide instruction in traditional secular subjects in the traditional secular way. There is nothing to suggest that adherence to the Protestant faith is essential to the performance of this job. Teachers in kindergarten through eighth grade lead their

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[16] This description of the Schools' purpose is consistent with Mrs. Bishop's desire that the Schools "provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women." *See* note 1, *supra*.

classes in prayer, but there is no evidence the Schools review the content of the prayer for conformity to Protestant doctrine or that non-Protestants are not qualified to lead students in prayer. The Schools also expect teachers to serve as role models and provide general instruction in morals, but they do not review or inquire into their teachers' personal religious life or general moral principles, and do not inquire whether the teachers integrate Protestantism into their teaching. The Schools identify no skills or aptitudes which persons affiliated with the Protestant tradition possess as a class that are essential to the performance of those job functions. Moreover, the record indicates the Protestant affiliation requirement is nominal —if a prospective teacher represents he or she is Protestant, the prospective teacher is presumed able to lead prayers and serve as a moral role model.[17]

The Schools rely on the Seventh Circuit's decision in *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986), a case decided before *Johnson Controls*, to argue the Protestant-only requirement relates to the "essence" of the Schools because it is necessary to creation of a "Protestant presence" on campus. The district court agreed, holding "the 'Protestant presence' is significant to the educational and normal operation" of the Schools. 780 F.Supp. at 1321.

EEOC contends *Pime* is inconsistent with *Johnson Controls*. Even if *Pime* were an accurate statement of the law in light of *Johnson Controls*, however, it could not bear the weight the Schools would have it carry. *Pime* approved a Jesuit "presence" of four positions in the Philosophy Department of Loyola University, a school with "a long Jesuit tradition" and a largely Catholic student body.

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[17] The Schools do not apply the Protestant-only requirement to teachers in programs receiving federal funding, although the source of funding has no apparent relationship to the qualities required to teach such courses.

Id. at 352. The court focused on the tradition and character of the school and the desire of administrators " 'that students would *occasionally* encounter a Jesuit.' " *Id.* at 354 (emphasis added). The court stated it was "wholly reasonable to believe that the educational experience at Loyola would be different if a Jesuit presence were not maintained." *Id.*

In this case, the Schools will have a Protestant "presence" equal to or greater than the Jesuit "presence" at Loyola even if the proportion of Protestants on the faculty falls well below one hundred percent, and there is no indication the educational experience at the Schools will be any different if some of the teachers are not Protestants. Moreover, the Schools seek to retain a wholly Protestant faculty at a school whose student body has a majority of non-Protestant students and whose tradition and character is rooted more in Hawaiian history and culture than in specific principles of Protestantism.

The fact that the Protestant-only requirement appears in Mrs. Bishop's will cannot in itself alter the result. *Cf. Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-26 (9th Cir.1971) (compliance with state law does not transform a discriminatory practice into a BFOQ). The will does not establish a religious school, nor stipulate any relevant qualifications Protestant teachers would bring to teaching positions at the Schools. The will suggests only that Mrs. Bishop was stating a personal preference based on her own experience in missionary schools. This kind of personal preference is not a BFOQ when expressed by a living employer, and there is no reason to reach a different conclusion because the preference is expressed posthumously.[18]

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[18] We also reject the suggestion that Mrs. Bishop's will creates a BFOQ because failure to comply with its provisions may violate Hawaii law and void the trust. Hawaii courts approved the merger

Reversed and remanded for entry of partial summary judgment in favor of EEOC. Each side will bear its own costs of appeal.

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of the separate boys and girls schools established by the will because a change in circumstances warranted a departure from the will. *Collins v. Tavares*, 37 Haw. 109 (1945); *see also Murray v. Kobayashi*, 50 Haw. 104, 106, 431 P.2d 940 (1967) ("Mrs. Bishop did not direct the trustees to establish religious schools"). These cases suggest Hawaii courts would also approve an involuntary departure from the Protestant-only requirement to comply with Title VII.

APPENDIX B

UNITED STATES DISTRICT COURT
D. HAWAII

Civ. No. 90-539 ACK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Defendant.

Aug. 1, 1991

John de Pemberton, Jr., Stephen Passek, E.E.O.C., San Francisco Dist. Office, San Francisco, Cal., for plaintiff.

Watanabe Ing & Kawashima, James Kawashima, Cynthia Winegar, Colleen I. Wong, Sr. Counsel, Kamehameha Schools/Bishop Estate Legal Dept., Honolulu, Hawaii, for defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

KAY, Chief Judge.

I. INTRODUCTION

EEOC and Kamehameha Schools/Bishop Estate (KSBE) bring motions for summary judgment. For the following reasons, the court grants KSBE's motion and denies EEOC's motion.

II. FACTS

The will of Bernice Pauahi Bishop established Kamehameha schools. The will required that teachers at the school be Protestants. Carole Edgerton responded to an advertisement offering a teaching position at KSBE. She was told of the religious qualification. She was not Protestant. She filed a charge of discrimination with EEOC. EEOC found that Edgerton was discriminated against on the basis of her religion which was in violation of Title VII of the Civil Rights Act of 1964. EEOC attempted to conciliate the matter with KSBE but was told that KSBE could not do so because of the directive in Mrs. Bishop's will. EEOC then filed this lawsuit. Both parties have filed motions for summary judgment on the issue of whether KSBE is exempt from Title VII's prohibition against hiring based on religion. Both parties have agreed that the scope of this lawsuit is limited strictly to the kindergarten through twelfth grade teaching positions at the Kamehameha Schools (exclusive of the adjunct schools at other sites).

III. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Id.* at 322, 106 S.Ct. at 2552.

> If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment.

T.W. Electrical. Serv. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted). Instead, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, " '*specific facts* showing that there is a genuine issue for trial.' " *Id.* (quoting Fed.R.Civ.P. 56(e)) (emphasis in original). At least some " 'significant probative evidence tending to support the complaint' " must be produced. *Id.* (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968)). Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir.1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir.1987) (citing, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987),

cert. denied, 484 U.S. 1006, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988). Moreover, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (footnote omitted). Indeed, "if the factual context makes the non-moving party's claim *implausible,* that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics,* 818 F.2d at 1468 (emphasis in original) (citing, *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356.). Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Service,* 809 F.2d at 630-31.

B. THE MERITS

This lawsuit arises out of a provision in the will of Mrs. Bishop. It provides that:

> I give, devise and bequeath all of the rest, residue and remainder of my estate . . . unto the trustees below named . . . to hold upon the following trusts, namely: to erect and maintain . . . schools . . . called the Kamehameha Schools. . . . I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. . . . I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants.

Mrs. Bishop's will, ¶ 13 (exhibit 1 of Winegar affidavit filed April 5, 1991.)

KSBE apparently concedes that the "Protestant-only" hiring requirement is discriminatory and otherwise would be in violation of the Civil Rights Act of 1964;[1] however, KSBE argues that its "Protestant-only" hiring requirement is exempted from the Civil Rights Act under three code sections. 42 U.S.C. § 2000e-2(e)(1); 42 U.S.C. § 2000e-1; and 42 U.S.C. § 2000e-2(e)(2).

1. Bona Fide Occupational Qualification; 42 U.S.C. § 2000e-2(e)(1)

Section 703(e)(1) of Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e-2(e)(1) and provides that

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

EEOC argues that the "Protestant-only" hiring requirement for teachers is not a bona fide occupational qualification (BFOQ) within the meaning of Section 703(e)(1).[2] KSBE argues that it is.

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[1] Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), states that:

> [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to . . . employment, because of such individual's . . . religion. . . .

[2] EEOC concedes, however, the requirement is bona fide as to those teaching positions at the school where the teachers actually are teaching a religion class, or to the positions of chaplin (sic) and associate chaplain. *See* "stipulation regarding 'BFOQ' affirmative defense."

"The BFOQ defense is written narrowly, and this Court has read it narrowly." *International Union UAW v. Johnson Controls,* —— U.S. ——, *111 S.Ct. 1196, 1204, 113* L.Ed.2d 158 (1991) (sex discrimination); *see also Dothard v. Rawlinson,* 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786, (1977) (sex discrimination); *Rasul v. District of Columbia,* 680 F.Supp. 436, 440 (D.D.C.1988) (religious discrimination); *Kern v. Dynaelectron Corp.,* 577 F.Supp. 1196, 1199 (N.D.Tex.1983), *aff'd,* 746 F.2d 810 (5th Cir.1984) (religious discrimination).[3] "[I]n order to qualify as a BFOQ, a job qualification must relate to the 'essence' or to the 'central mission of the employer's business.'" *Johnson Controls,* 111 S.Ct. at 1205. The Court, in examining the language of the BFOQ exception, noted that it suggested that discrimination "must relate to ability to perform the duties of the job." *Id.* at 1206.[4]

The parties prepared a stipulation regarding this exemption. The stipulation provides "the KS BE contends that the Will of Mrs. Bishop by its language creates a [BFOQ] for all teachers to be of the Protestant religion in order that there be a Protestant presence" at the

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[3] *Kern* noted that the "plain language" of the BFOQ exception, which applies equally to sex and religious discrimination, makes caselaw discussing the BFOQ exception in the context of sexual discrimination equally relevant and applicable to religious discrimination. 577 F.Supp. at 1199.

[4] The Statute thus limits the situations in which discrimination is permissible to "certain instances" where . . . discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

111 S.Ct. at 1204.

schools. *See* Stipulation regarding BFOQ affirmative defense, at ¶ 2a. The stipulation further provides that

> KS/BE is not contending that, apart from their status as teachers generally, there is anything specific about the subject matter of any given teacher position (such as English, science, mathematics) . . . that would make a teacher being Protestant a [BFOQ] within the meaning of this exemption.

Id.

The court construes the stipulation to mean that, although there is not anything specific within the subject matter of the teachers' position (i.e., math, English, science, etc.) that would justify limiting teachers to Protestants, there is nothing within the stipulation that would prohibit the court from finding that a "Protestant presence" or Protestant perspective was a valid BFOQ based on their status as teachers generally and under the will of Mrs. Bishop. It was the understanding of the court, based on the hearing, that the parties concurred that this was the proper interpretation of the stipulation.

KSBE contends that a "Protestant presence" at the school is a valid BFOQ because such presence is important to the successful operation of the schools. KSBE relies on *Pime v. Loyola University of Chicago*, 803 F.2d 351 (7th Cir.1986), for this proposition.

In *Pime*, the Seventh Circuit held that Loyola University's decision to seek Jesuit philosophy professors because it wanted a "Jesuit presence" on campus was not a violation of Title VII. The court held that such a qualification was a valid BFOQ.

Loyola University had a long Jesuit tradition. Until 1970, it was governed by an all-Jesuit board of trustees. In 1970, the bylaws were amended allowing nearly two-thirds of the trustees to be non-Jesuits. In 1986, 93% of the academic administrators, and 94% of the teaching staff were non-Jesuit. About 75% of Loyola's students

came from Catholic backgrounds. In 1978, Pime was a part-time philosophy professor at Loyola who was Jewish. The philosophy department consisted of 31 professors, 4 of which were Jesuits. The university had three full-time teaching positions in its philosophy department to fill. The University decided that it wanted to fill the 3 positions with Jesuits. Pime applied for and was rejected for the position. He sued.

The court held that the

> Jesuit "presence" is important to the successful operation of the university. It appears to be significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus. It requires more to be a Jesuit than just adherence to the Catholic faith, and it seems wholly reasonable to believe that the educational experience at Loyola would be different if Jesuit presence were not maintained. . . . One witness expressed the objective as keeping a presence "so that students would occasionally encounter a Jesuit."
>
> It is true that it has not been shown that Jesuit training is a superior academic qualification, applying objective criteria, to teach the particular courses. It is also true that in looking at claims for BFOQ, courts have considered only the content of the particular job at issue. [citation] Yet it seems to us that here the evidence supports the more general proposition that having a Jesuit presence in the Philosophy faculty is "reasonably necessary to the normal operation" of the enterprise, and that fixing the number at seven out of 31 is a reasonable determination.

803 F.2d at 353-54. The *Pime* court's test to determine whether a BFOQ is valid rests on a finding that the "pres-

ence" was significant to the educational tradition and character of the institution, and that it would be reasonable to believe that the educational experience would be different if the presence were not maintained.

Applying the *Pime* test, it is clear that the "Protestant presence" is significant to the educational tradition and normal operation of KSBE. The will founding the school mandated that the teachers be Protestant. Mrs. Bishop's will, ¶ 13. For the entire life of the school, teachers have been Protestant. Joint stipulation as to facts, ¶ 37. Moreover, the trustees of KSBE have been exclusively Protestant. *Id.*, ¶ 27.

The "Protestant presence" is also significant to the educational character of KSBE. David Kaupu, chaplin at KSBE, states that he believes that "the curriculum of the Schools is directed toward the propagation of the Protestant religion." KSBE motion, affidavit of David Kaupu, at 2; *see also* affidavit of David Kaupu filed May 20, 1991, ¶ 2. KSBE has mandatory religious education requirements covering, *inter alia*, Protestant Christianity. Winegar affidavit, exhibit 7.21 ("Ekalesia" syllabus). Students must pass the religious education classes in order to advance and graudate from the schools. KSBE Motion, affidavit of David Kaupu, ¶¶ 11-12; affidavit of David Kaupu filed May 20, 1991, ¶¶ 3-6.

Finally, KSBE illustrates a good example of how, if the Protestant-only requirement were not maintained, it would be reasonable to believe that the educational experience would be significantly different. KSBE refers to the practice at the schools where the K through 8 teachers lead their classes in daily prayer. KSBE hypothecates the probable scenario of a non-Protestant teacher refusing to lead the class in prayer. Such a situation would definitely change the educational experience at KSBE.

Application of the *Pime* test indicates that the Protestant-only requirement is valid.

EEOC argues that the case at bar is distinguishable from *Pime*. EEOC notes that *Pime* was a situation addressing the issue of whether a Jesuit-only requirement was valid when a Jesuit university wanted to hire Jesuits for only 7 of 31 teaching positions. In this case, EEOC points out, KSBE wants to use the BFOQ for *all* teaching positions at issue. KSBE rebuts this by correctly pointing out that it is not atypical for BFOQs to apply to a class as a whole. *See Dothard, supra* (women prison guards in "contact" positions).

EEOC also argues that *Pime* should not be followed for the reasons cited by Judge Posner in a concurring opinion in *Pime*. 803 F.2d at 354-58. Those reasons were that the majority opinion should not have reached the BFOQ issue because the BFOQ did not really involve religion, and that there was an inadequate factual record.

The court declines to reject *Pime* on the basis of Judge Posner's arguments. In essence, Judge Posner argued that there was no religious BFOQ involved because Jesuits do not qualify as a religion. This argument is unpersuasive because Loyola was looking to hire persons with certain religious backgrounds. Therefore, it is clear that a religious BFOQ was involved. As to the lack of an adequate record, Judge Posner concluded the record was inadequate to address a different issue—not the issue of a BFOQ.

Moreover, application of the *Johnson Controls* test, the Supreme Court's latest word on BFOQs, indicates that the Protestant-only hiring requirement is a valid BFOQ. *Johnson Controls* asked whether a job qualification was related to the essence or central mission of the employer's business.

EEOC argues that the Protestant-only requirement is not related to the "essence" of KSBE and the teachers' jobs. EEOC argues that the essence of KSBE's business is education, and not religion. To support its point

EEOC points to the case of *Collins v. Tavares,* 37 Haw. 109, 111 (1945), which EEOC claims is dispositive of the main purpose of KSBE—education.

The court rejects EEOC's reading of *Collins.* It does not lead to the conclusion that KSBE's main purpose is educational as distingiushed from educational with a Protestant perspective. The court reads *Collins* to simply mean that coeducation, as opposed to non-coeducation, was desirable and in accord with efficiently administering the estate and carrying out Mrs. Bishop's intent.

EEOC also claims that the educational essence of KSBE is demonstrated by the fact that the schools admit children of all religions and does not attempt to convert anyone to Protestantism. Further proof, EEOC contends, is found in the fact that KSBE does not require students or teachers to become members of the schools' church (Bishop Memorial Church), as well as the facts that there are no student members at Bishop Memorial Church, no Protestant church has authority over KSBE, the schools' chaplin has no authority over the non-religious curriculum, many educational programs contain no explicit religious content, and KSBE receives federal funds. KSBE points out that in *Pime* many of the same factors existed.

KSBE makes a statement in its opposition to EEOC's motion that merits additional discussion. KSBE states that "it is not inconsistent for [KSBE] to be an educational institution for native Hawaiians as well as a religious educational institution." KSBE's opposition to EEOC's motion, at 36.

Undoubtedly. KSBE has a strong Protestant influence on the standards over and above the religious persuasion of its teachers. KSBE has submitted various documents that support this finding. *See* Winegar affidavit, exhibits 1-9 (school handbooks, brochures, reports, etc. noting religious orientation of schools). Moreover, KSBE has an on-campus church, mandatory devotion times, manda-

tory religious education, and daily prayer. While Mrs. Bishop intended KSBE to provide education to native Hawaiians, she also wanted them instructed in "morals" and wanted the instruction to come from Protestants. Mrs. Bishop's will, ¶ 13. If one takes the intent of Mrs. Bishop, as expressed in her will, and considers how that intent has manifested itself in terms of the religious atmosphere existing at KSBE today, the inescapable conclusion is that the purpose of the schools is to provide native Hawaiian children with an education from someone who has experienced and presumably has a Protestant point of view.

It is evident that Bernice Pauahi Bishop, who had made the decision to "adopt the children of her people and make them her heirs" and who by her will founded Kamehameha Schools for her adopted children, earnestly intended and provided in her will that her adopted children as students at Kamehameha Schools would receive the same benefits of being taught by Protestant teachers with a Protestant perspective in their teachings as she had experienced herself in her school days at the Chief's Children's School, where she received religious and moral training for some ten years under the tutelage of Protestant missionaries. See joint stipulation as to facts ¶¶ 9-12. Beginning with her years as a student/boarder at the Chief's Children's School and continuing throughout her adult life, Mrs. Bishop attended the Kawaiahao Church on a regular basis, taught Sunday School and sang in the sanctuary choir. *Id.*, ¶ 15. This court finds that this intent of Mrs. Bishop has been implemented and fulfilled at Kamehameha Schools (*see* discussion *infra* under section 2).

Further, this Court finds that teachers by their presence and daily contact with students serve as role models and instruct them in morals. The President of Kamehameha Schools averred, "that the teachers' role is one of teaching by example and precept, by letting their exposure to

the Protestant tradition and its value system be something they, in turn by background, would bring to their students." Affidavit of Michael Chun, President of Kamehameha Schools.

Paragraph 72 of the Joint Stipulation as to facts shows that roughly ⅓ of the students at the Kamehameha Schools are Protestants, while a little over ⅓ are memof other religions. Although paragraph 73 states that the Schools do not have as a specific purpose the conversion of their non-Protestant students, providing a Protestant presence and perspective affords an out-reach and positive Protestant influence upon these other students. The arrangements also exposes the Protestant students to non-Protestant peers while under the protective influence of Protestant teachers. Mrs. Bishop adopted all of the children of her people and her will did not place any limitation on their religious affiliation.

The court concludes that the essence or central mission of KSBE is to provide native Hawaiians with an education from the Protestant point of view. Because the teachers are required to be Protestant in order to provide a Protestant viewpoint, the requirement that the teachers be Protestant is "reasonably necessary to the normal operation of" KSBE. 42 U.S.C. § 2000e-2(e)(1). Similarly, the essence or central mission of the teachers' jobs is to provide that viewpoint. A Protestant would be best qualified to teach such a viewpoint. The Protestant-only requirement "relate[s] to [the teachers'] ability to perform the duties of the job." *Johnson Controls,* 111 S.Ct. at 1206. In addition, a Protestant-only requirement relates to the "essence" or "central mission" of KSBE's business—providing education from the Protestant perspective. *Id.* at 1205.

The court finds that the "Protestant-only" hiring requirement is a valid BFOQ and exempts KSBE from Title VII.

2. Exempt Religious Organization; 42 U.S.C. § 2000e-1

Section 702 of Title VII, codified at 42 U.S.C. § 2000e-1, provides that

> [t]his subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

KSBE claims it is an exempt religious organization under this section. EEOC disputes this.

"Congress's conception of the scope of section 702 was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm." *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir.1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989). The case law is not very helpful because most cases deal with defendants that are clearly religious associations within the meaning of section 702. *Id.* "[T]he central function of section 702 has been to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities." *Id.* (footnote omitted).

The Ninth Circuit was reluctant to define the scope of section 702 and noted that when determining whether an organization is exempt under section 702, "each case must turn on its own facts." *Id.* "All significant religious and secular characteristic must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption." *Id.* (footnote omitted). Thus, the court is required to en-

gage in a balancing test to determine whether KSBE is exempt.[5]

KSBE presents the following facts to support its assertion that its purpose and character are primarily religous:

(1) All trustees for the 104-year life of the schools have been Protestant;

(2) Mrs. Bishop desired for the children to be instructed in morals by Protestants;

(3) The Hawaii Supreme Court, in *Murray v. Kobayashi,* 50 Haw. 104, 431 P.2d 940 (1967), held that KSBE is operated in connection and is affiliated with the Bishop Memorial Church. The Court in *Murray* interpreted Mrs. Bishop's will to be "permeated with expressions of her interest in the exposition of the Protestant religion [and] [i]n recognition of this interest the trustees established the Bishop Memorial Church as an integral part of [KSBE] and injected religion in the school program. [¶] A review of the record clearly shows that [KSBE] and Bishop Memorial Church are operated by the trustees in

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[5] EEOC claims that this court should not engage in the *Townley* balancing test because Congress specifically provided a formula for determining when a religious educational institution is exempt in section 703(e)(2) of the Civil Rights Act. *See* 42 U.S.C. § 2000e-2(e)(2). There is no authority cited for this proposition. While 703(e)(2) addresses "religious schools," likewise section 702 specifically addresses "educational institutions." Although EEOC argues that KSBE is an educational institution, the result of EEOC's reasoning is that KSBE may not be examined under section 702 to determine whether it qualifies for an exemption as an educational institution which meets the conditions of that statute. In any event, the court declines to accept EEOC's invitation and analyzes whether KSBE is exempt under *Townley*'s section 702 balancing test because section 702 specifically applies to "educational institutions." 42 U.S.C. § 2000e-1. The court will analyze KSBE under section 703(e)(2) below.

connection with one another." 50 Haw. at 106, 431 P.2d 940;

(4) EEOC issued, in the past in the *Puette* case, a no cause determination regarding the Kamehameha schools in the same Protestant-only requirement (Winegar affidavit, exhibits 3-5);

(5) In the *Puette* case, EEOC adopted the Hawaii Department of Labor's finding that KSBE's Protestant-only requirement was exempted under section 702 and Hawaii law (*Id.*, exhibit 4);

(6) KSBE refers to itself as a Protestant school (KSBE's opposition to EEOC's motion, Wong affidavit, exhibit B (advertisement by KSBE for substitute teacher position giving rise to this litigation whether KSBE refers to itself as "A Non-Denominational Protestant School.")));

(7) KSBE is a non-profit institution;

(8) There has been an unbroken chain of over 100 years of mandatory devotional services, religious education requirements, and prayers at KSBE; and

(9) EEOC found in its determination in the underlying claim that KSBE has a "religious orientation similar to that found in most church-schools." (KSBE opposition to EEOC's motion, Wong affidavit, exhibit C, p. 7 n. 8).

EEOC presents the following facts to show secular characteristics that would support its claim that KSBE's primary purpose is educational and not religious:

(1) Neither Mrs. Bishop's will nor the "Mission Statement" make reference to KSBE as a "religious" school;

(2) The non-profit status of KSBE is based on its being charitable and educational—not religious;

(3) KSBE is involved in land management and portfolio investments (referring to the portion of the trust which manages the assets of the trust);

(4) KSBE impliedly holds itself out as a secular institution by applying for and receiving federal funds;

(5) KSBE is owned, controlled, and supported by a secular estate; and

(6) The Protestant-only requirement is not a tenet of the Protestant faith.

EEOC's cited secular characteristics do not tip the balance in its favor. Several factors that it cites require discussion. For example, its reference to the failure to mention KSBE as religious schools in the will and mission statement as indicative of a secular purpose is contradicted by the Hawaii Supreme Court's decision in *Murray*, EEOC's own admission that KSBE's religious orientation is similar to many other church schools, and the preponderance of evidence submitted by KSBE showing otherwise (Winegar affidavit, exhibits 1-9).

Second, KSBE points out that its non-profit status (charitable and educational basis and not religious) is because of an Internal Revenue Code determination and therefore is non-determinative and irrelevant on whether it could be exempt as a religious organization under section 702. KSBE's argument has merit as " 'most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education.' " *Pime*, 803 F.2d at 358 (Posner, J., concurring).

Third, the fact that KSBE's is involved in land management and portfolio investments is irrelevant because the focus of this lawsuit is hiring for the kindergarten through twelfth grade teaching positions at the schools. The inquiry is directed at whether the schools, and not Bishop

estate in the aggregate, is a religious organization within the meaning of section 702.

Fourth, the fact that KSBE receives federal funds does not necessarily indicate that it is not religious. Federal funding is not used in studies taught by teachers hired under the "Protestant-only" provision of the Mrs. Bishop's will. Joint stipulation as to facts ¶ 40. It seems to the court that it is a matter of judicial notice that many religious organizations receive state and federal funding.

Fifth, the fact that a Protestant-only requirement is not a tenet of the Protestant faith does not comport with the *Townley* requirement to look at the characteristics of the employer. This factor (Protestant-only requirement is a tenet of the Protestant faith) looks at the Protestant faith and not at KSBE. Further, if this factor were relevant to determining whether an organization was exempt under section 702, it would seem that many religious educational organizations would lose on this point.

The court notes KSBE is owned, controlled, and supported by a secular estate; although all of the trustees of the estate must be Protestant pursuant to Mrs. Bishop's will. In fact, as EEOC points out, KSBE is really anomalous in that the typical religious organization is owned, supported, and/or controlled by a church. Here, KSBE owns, supports, and controls the Bishop Memorial Church. This fact is indeed unique to the cases involving religious organizations.

After reviewing all the above factors, the court concludes the evidence weighs in favor of finding that KSBE has a religious purpose and character under the *Townley* balancing test.

Indeed, the President of Kamehameha Schools averred that the "daily contact with Protestant role models, prayer before meals, devotionals, required religious courses, the Bishop Memorial Church and Chapel on campus, religious programs of the school, deputation

teams, and religious extra-curricular activities all speak to the degree to which religion plays a role at Kamahameha." Affidavit of Michael Chun, President of Kamehameha Schools.

The Kamehameha Schools Planning Survey conducted in 1961 by Booz, Allen and Hamilton, Management Consultants, found that, "[i]t appears that, as a devout Christian, Mrs. Bishop believed that young people attending the Kamehameha Schools would benefit from living and learning in an environment that would provide a positive Christian emphasis." Winegar affidavit, exhibit 7.4. At page 56 the Survey found that, "a second important purpose of the preparatory department is to provide a Protestant Christian setting for the education of young children. The purpose is clearly reflected in the program, which includes time for formal study of Christian religion, devotional services, a daily 'quiet time' at the opening of school and other features clearly consistent with this kind of objective." At page 107 of Volume 2 the report concluded, "Kamehameha Schools strive today to educate their students in a Protestant Christian environment and to prepare them for lives as useful and self-sufficient citizens and leaders." At page 27 of Volume 3 the Survey noted that "the objectives of the religious services sponsored by the Kamehameha Schools are to provide a Protestant Christian atmosphere which pervades every aspect of campus life, to encourage worship, to engender an understanding and appreciation of the heritage afforded by Christianity, to provide opportunities for Christian service to others, and to give personal counselling—all for purposes of helping students to shape themselves into persons of good moral character."

The court finds that KSBE is a "religious educational institution" within the meaning of section 702 of the Civil Rights Act and is exempt from Title VII.

3. Exemption Based on Curriculum Directed Toward Propagation of a Religion; 42 U.S.C. § 2000e-2(e)(2)

Section 703(e)(2) of Title VII, codified at 42 U.S.C. § 2000e-2(e)(2), provides that

> it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

The parties have cited no case law explaining the operation of this section. The court has found none in its research. The only authority cited by either party which directly addresses this issue is EEOC Decision 75-186.

EEOC correctly notes that section 703(e)(2) contains two alternative exemptions. The first part of the statute grants an exemption if the school is owned, supported, controlled, or managed by a particular religious corporation, association, or society. The second part grants an exemption if the curriculum of the school is directed toward the propagation of a particular religion. KSBE argues it is exempt under the second exemption of this section.

EEOC claims that KSBE does not propagate the Protestant faith in its education because it does not meet the level of "propagation" required by section 703(e)(2). EEOC cites to *E.E.O.C. v. Southwestern Bap. Theological Seminary,* 651 F.2d 277 (5th Cir. Unit A 1981) as

the appropriate standard to be used in deciding if a school has met section 703(e)(2)'s "propagation" requirement.

EEOC's reliance on *Southwestern Bap.* is misplaced. The case did not consider section 703(e)(2) but rather a completely unrelated matter. The court finds that the more logical standard to use is the one found in EEOC Decision 75-186.

In Decision 75-186, the EEOC held that a school was exempt from Title VII under section 702 and both exemptions contained in section 703(e)(2). *See* EEOC decision 75-186, at p. 4357. EEOC noted in decision 75-186, "that although religion is not taught as a separate subject, it is an integral part of the child's daily life at school." *Id.* at 4356.

The court notes that the facts and analysis in decision 75-186 are somewhat sparse with respect to the "propagation" exemption. However, the court gleans the following conclusion from decision 75-186: If religion is an "integral part" of the child's daily life at school, then the school propagates religion within the meaning of section 703(e)(2). The court finds that this "integral part" test for determining whether a school propagates a particular religion seems reasonable and proper. Thus the court will apply it to KSBE in order to determine if it propagates a particular religion.

KSBE points to a number of facts that illustrate the propagation of the Protestant faith at KSBE. *See* KSBE's motion, at 39-42.[6]

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[6] KSBE points to the following facts: KSBE is wholly supported, controlled and managed by Protestant trustees; the trustees also operate and control Bishop Memorial Church; the Bishop Memorial Church is operated on the campus of KSBE; the curriculum is directed toward the propagation of the Protestant religion (citing affidavit of David Kaupu); mandatory Sunday chapel attendance for boarders and weekly chapel attendance for all students has been required for over 104 years; required prayer before all meals (with the exception of cafeteria meals for grades 9-12); required religious education for 104 years; certain students are taught by

EEOC responds by pointing to facts that it claims show the absence of religion. EEOC claims that KSBE's catalogs are without reference to religion, thus illustrating the non-propagation of religion at KSBE. EEOC's motion, at 42. KSBE rebuts by directing the court to a KSBE catalog stating that "[r]eligion is an important part of the educational program." Winegar affidavit, exhibit 7.16, at 10. The court notes that there are also numer-

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either Christian Education teachers or ordained Protestant ministers; teachers of kindergarten through eighth grade lead their classes in daily prayer before the noon meal; other school events involve prayer (i.e., other meals, athletic events, commencement ceremonies, song festivals); school publications contain religiously-oriented material; and the school encourages and sponsors participation by students in religious organizations. As noted before, the Hawaii Supreme Court, in *Murray*, interpreted Mrs. Bishop's will to be "permeated with expressions of her interest in the exposition of the Protestant religion [and] [i]n recognition of this interest the trustees established the Bishop Memorial Church as an integral part of [KSBE] and injected religion in the school program. [¶] A review of the record clearly shows that [KSBE] and Bishop Memorial Church are operated by the trustees in connection with one another." 50 Haw. at 106, 431 P.2d 940. To support this finding the *Murray* Court cited to the following "uncontroverted evidence" found by the trial judge which is similar to the evidence in this case:

> "The trustees have brought religion into the Schools with: (1) five minutes of daily devotions at the beginning of each school day; (2) a prayer before each meal at Schools; (3) compulsory Sunday Chapel attendance for all boarding students; (4) religious teaching by homeroom teachers in kindergarten and the first and second grades; (5) teaching of religion by Christian Education teachers for 30 or 40 minutes once a week in grades third through eighth; (6) talks by the Chaplin or Assistant Chaplin to classes on religious aspects or allusions in subjects such as science, literature and social studies, in grades ninth through twelfth, about fifty times per year; (7) Sunday School for seventh and eighth grade students; and (8) voluntary student activity in connection with the school Chapel or religious or quasi-religious organizations at the Schools."

Id. at 106 n. 3, 431 P.2d 940.

ous other similar references in school literature. *See e.g.*, exhibit 7.1, at C-7, C-8 (Introduction pamphlet to KSBE); exhibit 7.11, at 10 (KSBE student handbook).

EEOC points to other KSBE publications it claims illustrate a lack of propagation. *See* EEOC's motion, at 42-43. EEOC's use of school literature to prove its point is unavailing. EEOC selects portions of the schools' publications that do not refer to religion to make its point. These contentions must fail in light of the fact that the KSBE publications are replete with references to religion. *See generally*, Winegar affidavit, exhibits 1-9.

EEOC also seems to argue that the lack of a concerted effort to convert non-Protestants by KSBE is indicative of non-propagation. However, the Protestant presence and perspective in teaching affords an outreach and exposure to spread the Protestant religion to the non-Protestant students. More importantly, the curriculum nurtures and develops the religious beliefs of the Protestant students.

EEOC also claims there is a lack of propagation illustrated by the fact that KSBE does not monitor whether its teachers have integrated the tenets of Protestantism into their work and lives.[7] It is likely there would be an expressed public outrage if KSBE was to look over the shoulders of its teachers and supervise their daily lives. Moreover, the argument misses the mark in the inquiry under section 703(e)(2). The court should be looking

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[7] The joint stipulation, however, does provide that prior to April 1988, KSBE required all teachers, at the time of hire, to provide KSBE with either a copy of a baptismal record or a letter from their minister attesting to their membership with a Protestant church. Subsequent to April 1988, KSBE required all new teachers subject to the Protestant-only hiring requirement to sign a certification statement attesting his/her membership in the Protestant religion at the time of hire. The certification provided that upon KSBE's request the teacher must provide a baptismal record or letter from a minister attesting to the teacher's membership in the Protestant religion.

at the curriculum, not the teachers' personal lives to determine whether the schools propagate religion. In any event, the foregoing evidence that the school is involved in the propagation of religion negatives (sic) any possible inference that KSBE's refraining from monitoring teachers' activities indicates the non-propagation of religion.

Based on the evidence adduced by the parties, it is clear that "religion . . . is an integral part of the child's daily life at" KSBE, EEOC Decision 75-186, at 4356, and that, "the School's curriculum 'is directed toward the propagation of a particular religion,' i.e., [Protestant] Christianity." *Id.* KSBE is exempt from Title VII under the "propagation" prong of section 763(e)(2). An indication of the Kamehameha Schools fruitfulness in fulfilling the directive of Mrs. Bishop in her will to provide "instruction in morals and in such useful knowledge as may tend to make good and industrious men and women" through teachers of the Protestant religion is shown by the fact that some 14 Protestant ministers who graduated from the Kamehameha Schools participated in the dedication service of the Bernice Pauahi Bishop Memorial Chapel on April 3, 1988. Winegar affidavit, exhibit 7.8. In addition, EEOC found in its determination in the underlying claim that KSBE has a "religious orientation similar to that found in most church-schools." (KSBE opposition to EEOC's motion, Wong affidavit, exhibit C, p. 7 n. 8).

IV. CONCLUSION

The court grants KSBE's motion for summary judgment. The court finds that KSBE is exempted from Title VII under 42 U.S.C. § 2000e-2(e)(1), 42 U.S.C. § 2000e-1, and 42 U.S.C. § 2000e-2(e)(2). Accordingly, EEOC's motion for summary judgment is denied.

APPENDIX C

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
San Francisco, California 90143

Charge No. 370-89-0539

Carole Edgerton
94-1056 Mahua Place
Waipahu, Hawaii, 96797 Charging Party

Kamehameha Schools Bishop Estate
c/o Legal Department
Kawaiaha'o Plaza
567 South King Street, Suite 328
P.O. Box 3466
Honolulu, Hawaii 96801 Respondents

DETERMINATION

I issue the following determination on the merits of this charge.

Respondent is an employer within the meaning of Title VII of the 1964 Civil Rights Act, as amended. 42 U.S.C. § 2000e, *et seq.*, ("Title VII"). Timeliness, deferral and all other procedural requirements for coverage have been met.

Charging Party alleges that she was denied consideration for hire for "Substitute Teacher" positions because of her religion, non-Protestant.

Respondent does not deny that Charging Party made a telephone inquiry on or about February 1, 1989, regarding Respondent's advertised vacancies for "Substitute Teachers", and that Charging Party was told of Respond-

ent's policy of giving preference to Protestants for teaching positions. Respondent states that Charging Party made no further inquiry after this inquiry and this assertion is not in dispute.

Respondent admits that it is the policy and practice of the Kamehameha Schools/Bernice Pauahi Bishop Estate (hereinafter "Schools" unless otherwise specified) in the hiring of teachers and faculty, who have direct contact with the students at the Schools, to give preference to members of the Protestant religion. Respondent explains that this policy and practice is based upon the express written directives of Mrs. Bernice Pauahi Bishop, founder of the Schools, as stated in her Last Will and Testament, and adopted by the Trustees of her Estate.[1] Respondent states that all teachers hired by the Schools pursuant to this policy and practice have been Protestant.

It is beyond dispute that Respondent's policy and practice of hiring only Protestants violate Title VII, unless they fall within one of the exemptions in Title VII. Respondent contends that its policy and practice do not violate Title VII because of the three religion exemptions contained in the statute, all of which apply to the Schools, according to Respondent. The applicability of each of these three exemptions to the Schools will be discussed in turn.

1. *Section 702*—This section states that Title VII "shall not apply to a religious corporation, association,

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[1] The language of the Will relied on by Respondent is as follows: "I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. . . ." I also direct that the teachers of said schools shall forever be persons of the Protestant religion . . . (Article Thirteenth, Will of Bernice Pauahi Bishop, dated October 31, 1883).

educational institution, or society with respect to the employment of individuals of a particular religion. . . ." [2]

The first step in the analysis of a claim for a statutory exemption to a remedial statute, such as the Section 702 exemption to Title VII, must begin with the axiom of statutory construction that such exemptions must be narrowly construed. That axiom must be applied here. The exemption can be granted to Respondent only to the extent clearly articulated by Congress, since the exemption allows conduct which would otherwise be unlawful employment discrimination.

The Ninth Circuit Court of Appeals in *EEOC* v. *Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988) reviewed the relevant legislative history and concluded that the 702 exemption "was not a broad one". *Id.* at 618. Congress "assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm." *Ibid.*

In EEOC Decision No. 75-186, February 21, 1975, *EEOC Decisions* [CCH] 6553 (1983), the Commission found that the 702 exemption applied to a Christian school that was "created and established, and is wholly owned, supported, controlled and managed by the Church".

In *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980) the exemption was applied where defendant proved that it was owned and operated by the convention

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[2] Because this Determination relies on legislative history regarding the interplay between 702 and 703(e)(2), it is necessary for a proper understanding of the legislative intent as to the 702 exemption to quote 702 as it existed at the time of the legislative debate. The original 702 stated in relevant part as follows: "This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association or society of its religious activities . . ."

of Southern Baptist Churches. Similarly in *EEOC* v. *S.W. Baptist Theological Seminary,* 651 F. 2d 277 (1981) the exemption was applied where the defendant proved that it was owned, operated and controlled by a convention of Baptist churches, and the seminary itself is entitled to the status of "church". *Id.* at 283. The exemption was also applied in *Feldstein* v. *Christian Science Monitor,* 555 F.Supp. 974 (D. Mass. 1983) where defendant was found to be directly accountable to the Board of Directors of the Church. The court found that the Monitor is "merely a department of the First Church of Christ, Scientist" and is "operated exclusively for religious purposes." *Id.* at 978.

During the course of legislative debate on a proposed amendment to Title VII, which would ultimately become § 703(e)(2) [the 3rd religion exemption in Title VII], the scope of the Section 702 exemption was discussed. "The consensus was that organizations were not covered under § 702 if they were merely 'affiliated' with a religious organization." *EEOC* v. *Townley Engineering & Manufacturing Co., supra,* 859 F.2d at 617.[3]

The second step in the analysis of Respondent's claimed 702 exemption, which would allow it to discriminate based on religion, is to look at the institution to determine whether it is a "religious" institution within the scope of the 702 exemption contemplated by Congress, as discussed above.

In its position statement filed with the Commission Respondent states that the Kamehameha Schools are "charitable and *educational* organizations (emphasis supplied) and are operated and controlled by the Trustees

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[3] On the other hand, a church-supported organization "would 'unquestionably' be exempt under Section 702 if it were 'wholly owned' by the religious order." *EEOC* v. *Townley Engineering & Co.*; *supra,* 859 F.2d at 617 fn. 10, citing remarks by Rep. Roosevelt during the floor debate on Title VII.

of the Bernice Pauahi Bishop Estate.[4] Thus the Schools are not churches, or institutions like churches, and are not owned, operated or controlled by a church or religion.[5] Consequently, the Schools do not fit within the paradigm of a "religious" institution contemplated by Congress in granting the 702 exemption to Title VII.

Respondent relies heavily on the Bishop Will to support its claim that the Schools are "religious". Contrary to Respondent's assertion, the plain words of the Will do not create a religious institution but an educational institution with a primary focus on "morals". The fact that the will also uses the word "religion" with regard to the employment of teachers indicates the testator was capable of stating a religious requirement when she so intended. If Mrs. Bishop had wanted to create "religious" schools she could well have stated that instruction should be "religious" or there should be instruction in the Protestant religion. The only religious requirement set forth in the Will is for the *employment of teachers.* It is noted that Codicil No. 2 to the Will, para. 4th, indicates as follows:

> I also direct that said trustees shall have power to determine to what extent said school [*i.e.*, the school for boys] shall be industrial, mechanical or agricultural.

The testator's explicit reference to the type of curricula contemplated for the school for boys and the absence of any indication whatsoever that the curriculum be "religious" is noteworthy.

Finally, it is necessary to look at the relationship of the Schools to the "Bishop Memorial Church of the Kahe-

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[4] Respondent does not contend that the Bernice Pauahi Bishop Estate is a "religious" entity.

[5] Although the Trustees of the Bishop Estate are required by the Will to be Protestant, that fact does not make the school "religious". See *Fike* v. *United Methodist Children's Home of Virginia,* 547 F. Supp. 286, 290 (1982).

hameha Schools" (hereinafter "Church"). This Church is a distinct entity from the Schools, is not referenced in the Bishop Will and was created years after the Schools were created. The Church's original By-Laws (1908) and its Amended By-Laws (1969) indicate that "the government of this church is vested in the body of believers who compose it, acting through the church committee, insofar as its actions *do not interfere with the authority of the Trustees of these Schools.*" (Article III, Section 1). (emphasis supplied). Thus, unlike the legal authority authorizing the 702 exemption cited above, the Schools are not a church or an institution like a church; nor are the Schools, owned, operated or controlled by a church or religious body; the Schools are at best affiliated with the above-referenced Church but not subject to its control. The School's authority is, in fact, explicitly protected from any control by the Church or by the Church's own By-Laws.

For all of the above reasons, I conclude that the Schools are not "religious" within the meaning of the Section 702 exemption to Title VII for "religious" institutions.[6]

2. *Section 703(e)(1)*—The second religion exemption in Title VII states as follows:

> (e) Notwithstanding any other provision of this title (1) it shall not be an unlawful employment practice

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[6] There is one additional reason which supports this conclusion. Congress provided a definition for a "religious educational institution" in Section 703(e)(2) but not for Section 702. The legislative history indicates that the 703(e)(2) exemption is narrower but *more leniently drawn* than the Section 702 exemption. See *e.g., Fike* v. *United Methodist Children's Home of Virginia, supra,* 547 F.Supp. at 290 fn. 3. Since Respondent in this case clearly does not fit within the more generous 703(e)(2) exemption (see discussion at pp. 6-8, below), it would be improper for this Agency to interpret the 702 exemption to provide an educational institution with a bigger loophole to Title VII coverage than was contemplated by Congress in 703(e)(2).

> for an employer to hire and employ employees . . . on the basis of his religion . . . in those instances where religion . . . is a bona-fide occupational qualification reasonably necessary to do the normal operation of that particular business enterprise.

In this case Respondent claims that being Protestant is a bona-fide occupational qualification ("bfoq") for the position of "teacher" regardless of the subject matter to be taught.

The Supreme Court has ruled that the bfoq "was in fact meant to be an extremely narrow exception." *Dothard* v. *Rawlinson,* 433 U.S. 321, 334 (1977). In looking at claims of bfoq courts have considered only the content of the particular job at issue. *Trans World Airlines* v. *Thurston,* 469 U.S. 111, 122 (1985). Here there is nothing in the content of the generic teacher position that requires each and every teacher to be Protestant to carry out the teaching operation of the Schools.[7] It is understandable that Respondent should claim in this case every religion exemption available under Title VII, including the bfoq, as they are required by the mandate of the Bishop Will to give preference in employment to Protestants. The Commission's obligation, however, is to test this employment requirement by the bfoq standard incorporated by Congress in the statute and by the applicable case law.

The bfoq exemption for religion was granted in *Kern* v. *Dynalectron Corp.,* 577 F. Supp. 1196 (N.D. Tex. 1983). In that case the bfoq was found necessary for all helicopter pilots stationed in Jeddah, Saudi Arabia, to be Moslem. Under the laws of that country, based on the tenets of Islamic religion, non-Moslems were prohibited from entering the holy area of Mecca under penalty of

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[7] If Respondent were to narrow the claimed bfoq exemption to teacher positions involving religion, the result may well be different.

death. Helicopter pilots stationed in Jeddah were regularly required to fly over the holy area of Mecca. Thus the bfoq was necessary.

Based on the applicable law and the evidence of record I conclude that Respondent has not met its burden of showing that being Protestant is reasonably necessary to the performance of each and every teacher position at the Kamehemeha Schools.

3. *Section 703(e)(2)*—The third religion exemption in Title VII states as follows:

> (e) Notwithstanding any other provision of this Title . . . (2) it shall not be an unlawful employment practice for a school . . . to hire and employ persons of a particular religion if such school . . . is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of such school . . . is directed toward the propagation of a particular religion.

This 703(e)(2) exemption must, like all exemptions to remedial statutes, be narrowly construed, since it authorizes conduct which would otherwise be unlawful.

The first half of the 703(e)(2) exemption exempts schools which are "owned, supported, controlled or managed by a particular religion or . . . religious corporation. As indicated above, the Schools are not owned, supported or controlled or managed by a particular religion or religious corporation but instead by a non-religious, individual estate. Respondent does not contend that the Bishop Estate is a religious entity. It is also not contended that the Schools are controlled by the Kamehameha Church, or any other religious body. Thus the

Kamehameha Schools are not "religious" within the meaning set forth by Congress in this portion of 703(e)(2).[8]

The second half of the 703(e)(2) exemption exempts schools where the "curriculum of such school . . . is directed towards the propagation of a particular religion."

It is undisputed that the Bishop Will created an employment preference for the Protestant religion. Even though this preference does not specify a single denomination, Protestantism can be easily construed to be a "particular religion" within the meaning of 703(e)(2). The critical question here for purpose of this exemption, however, is whether the curriculum of the Kamehameha Schools is directed toward the propagation of Protestantism.

After inspection of the curricula for the Kamehameha Schools for the last several years, it is determined that the curricula is primarily secular with a small percentage devoted to religion. This is clearly not a case such as *EEOC* v. *S.W. Baptist Theological Seminary, supra,* where the curriculum of the seminary was devoted to the teaching of future ministers and the propagation of the Baptist religion.

For the reasons stated above, I find that Respondent has not satisfied either the first or second half of the 703(e)(2) exemption.

Because none of the three religion exemptions contained in Title VII are applicable to the Kamehameha Schools, I find reasonable cause to believe that Respondent's policy and practice of hiring only Protestants for

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[8] It is clear from the evidence submitted during the investigation of this charge that the schools have a religious orientation that is similar to that found in most church-schools. However, Congress defined "religious" educational institutions in 703(e)(2) the way it did and chose not to include secular schools that included some religious activities in its curriculum.

teacher positions at the Kamehameha Schools is violative of Title VII.

Finally, it is noted that the Hawaii Supreme Court has concluded that the Schools' hiring preference based on religion does not violate the Hawaii fair employment law. *Murray* v. *Kobayashi,* 50 Haw. 104 (1967). This contrary conclusion does not detract from the conclusion reached in this Determination but instead points up the difference between the federal and state statutes.

The Hawaii statute, Section 90A-8(e) Revised Laws of Hawaii ("RLH"), is different than Title VII's religion exemptions in one critical aspect. This difference in statutory provisions explains for the most part the different results reached as to the Kamehameha Schools' religious hiring preference. Section 90A-8(c) R.L.H. states as follows:

> Nothing contained in this part shall be deemed to . . . (e) prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by *or in connection with* a religious organization to promote the religious principles for which it is established or maintained. (emphasis supplied)

The Hawaii Supreme Court in *Kobayashi* relied specifically on the "in connection with" language of the state statute to grant the religious exemption to the Schools. *Murray* v. *Kobayashi, supra,* 50 Haw. at 106. It is the language that is not contained in Title VII, and consequently explains the different result under Title VII. In fact, it is noted that the *Kobayashi* court found that Mrs. Bishop "did not direct the Trustees to establish religious schools . . ." *Ibid.*

Having determined that there is a reasonable cause to believe that Respondent has engaged in an unlawful employment practice in violation of Title VII of the Civil

Rights Act of 1964, as amended, the Commission now invites the parties to join in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the immediate future to begin the conciliation process.

On behalf of the Commission:

/s/ Charles Wong for
FRED BROOKS
Acting District Director

Date: December 28, 1989

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16586

D.C. No. CV-90-00539-ACK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
November 5, 1992—Honolulu, Hawaii

Filed March 31, 1993
Amended May 10, 1993

Before: James R. Browning, William A. Norris and
Stephen Reinhardt, Circuit Judges

Opinion by Judge Browning

ORDER

The opinion in this case, No. 91-16586, slip op. 3021 (9th Cir. March 31, 1993), is amended to add a new paragraph at the beginning of footnote seven, on page 3029:

> [7] The Schools maintain a cooperative relationship with the Bishop Memorial Church, which receives financial support from the Bishop Estate and is a member of the Hawaii Conference of the United Church of Christ. However, the Schools themselves are not affiliated with the Church of Christ, and the parties stipulated that no Protestant denomination, including the Church of Christ, "owns, supports, controls or manages, in whole or significant part, the Bishop Estate or the Kamehameha Schools."

With this amendment, the petition for rehearing is denied.

FILED
OCT 14 1993
OFFICE OF THE CLERK

No. 93-171

In The

Supreme Court of the United States

October Term, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF CHRISTIAN LEGAL SOCIETY, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN COLLEGE COALITION, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EPISCOPAL CHURCH IN HAWAII, NATIONAL ASSOCIATION OF EVANGELICALS AND UNIVERSITY OF NOTRE DAME, AND VALPARAISO UNIVERSITY, *AMICI CURIAE*, IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

Whether schools and other institutions that attempt to link religion and culture can preserve their distinctive religious mission without being free to make employment decisions based on the exercise of a religious preference.

Whether the narrow judicial construction placed on an exemption that Congress gave to religious organizations frustrates the Congressional purpose, is at odds with the clear precedents of this Court on religious autonomy and presents an apparent conflict with other courts of appeals.

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No. 93-171

In The

Supreme Court of the United States

October Term, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF CHRISTIAN LEGAL SOCIETY, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN COLLEGE COALITION, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EPISCOPAL CHURCH IN HAWAII, NATIONAL ASSOCIATION OF EVANGELICALS AND UNIVERSITY OF NOTRE DAME, AND VALPARAISO UNIVERSITY, *AMICI CURIAE,* IN SUPPORT OF THE PETITION

INTERESTS OF *AMICI*

Amici are religious organizations and religious colleges that would be affected adversely by the judgment in this case if it were applied to them. *Amici* also include civil rights organizations dedicated to the advocacy of strong protection for the first of our civil liberties, religious freedom. The particular statements of interests are attached in the Appendix. The written consents of the

parties to the filing of this brief have been filed with the Court Clerk.

REASONS FOR GRANTING THE WRIT

I. Schools and other educational organizations committed to a religious mission cannot preserve that mission without being free to make employment decisions based on religious preference.

If ever there was a case that has consequences far beyond the specific facts in the immediate record before the Court, this is the case. The green light signal that the court of appeals has given to the EEOC to impose a rigid rule on religiously committed schools and other means of communication will have a severe impact on literally thousands of religious institutions throughout the nation. All of these institutions stand to lose a large measure of their control over their own hiring policies unless this Court grants the writ and reverses the judgment below.

We offer here (Parts I B and C, *infra*) only a small sampling of the kinds of institutions (schools and journals) that would be adversely affected by the national enforcement of Title VII by the EEOC along the lines indicated in the opinion of the court of appeals.

A. The narrow rule of construction adopted by the Court of Appeals would disqualify much of the religious educational community.

The court of appeals has proposed a rigid and unworkable standard for determining whether an institution is exempt under § 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a). The characteristics of an institution that the court of appeals scrutinized in this case included the "ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools." Pet. App. 6a. It should be noted that

these characteristics are not found in § 702 or anywhere else in Title VII. They are, instead, code words for judicial nullification of a statutory exemption that Congress expressly gave to religious educational institutions.

This list of judicially crafted criteria might seem relatively innocuous at first glance, but the application of these criteria to the facts of this case sends shivers up our collective spine. For example, the court of appeals attached primary and seemingly fatal significance to the fact that the petitioner schools have never been owned, supported, controlled, or managed by any particular religious denomination. Pet. App. 7a-8a.[1] Of the thousands of religious schools in this country, many are in fact owned or operated by a particular church or a faith community. But others have varying degrees of affiliations linking them loosely or closely to a particular church. Thus many of the colleges in our sample below describe themselves as either "nondenominational" or "interdenominational." But these facts should not control whether these institutions may take into account the religious convictions (or lack of them) of their teachers. In enacting § 702, Congress surely did not intend to stifle the ability of the thousands of independent, self-supporting religious schools and colleges to undertake their educational mission with a distinctively religious flavor.

Despite findings of fact about the bona fide efforts of the petitioner to organize a religious curriculum in its schools, Pet. App. 34a-38a, the court of appeals also announced that it would determine whether a curriculum is truly religious or merely ethical, and whether secular courses in the curriculum are taught from a "religious" or a "secular perspective." Pet. App. 10a-12a. As we suggest

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[1] This criterion derives not from § 702, but from another provision not at issue in this case, § 703(e)(2).

in Part II, this is the very sort of intrusive line-drawing that this Court has sought to avoid.

The court of appeals also implied that in order to qualify for the § 702 exemption, a school *must* discriminate on the basis of religion in its student admissions policy. Pet. App. 9a. This bizarre criterion alone would disqualify most of the inner-city parochial schools operated by the Catholic Church, which provide a quality education to minority children of all faiths. Many other religious communities view their educational mission as more extensive than preaching to the choir.

Perhaps the chief difficulty with the parsimonious approach of the court of appeals is that it undercuts the value of religious exemptions at the very moment when they are most needed. This Court has recently taught that religious organizations should, for the most part, turn to the political branches for legislation providing exemptions from a generally applicable norm, on the view that courts are not necessarily bound to supply one under the Free Exercise provision of the First Amendment. *Employment Division v. Smith*, 494 U.S. 872 (1990). *Amici* have on various occasions expressed their doubt as to the reliability of political institutions to preserve religious freedom. Here the Congress has acted to protect religious autonomy, but it has been subverted by judicial construction. This Court has never taught – in *Smith* or elsewhere – that when the political branches have, in fact, acted to provide an exemption to religious bodies, the statutory exemption should be given so ungenerous and confining an interpretation as that adopted here by the court of appeals. In fact, this interpretation is clearly contrary both to the logic of the *Smith* case and to the precedents of this Court deferring to legislative determinations of exemptions. *See, e.g., Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) and *Corporation of*

Presiding Bishop v. Amos, 487 U.S. 237 (1987) (adopting broad construction of the very exemption at issue here).

The only sort of institution that would qualify for exemption under the narrow standard constructed by the court of appeals would be a school that is owned outright by a church, that is strongly affiliated with a church in the sense of being operated by that church, that expresses its educational mission solely in overtly religious terms, that limits faculty and students to devout members of the sponsoring church, and that requires participation in chapel services among student activities.

There are several problems with this hypothetical school. Perhaps its worst feature is that it is so wildly hypothetical, in the sense that it is simply nondescriptive of the actual arrangements at religious schools anywhere in America. Certainly with respect to postsecondary education, *Amici* are unaware of *any* college or university in America that meets all of the criteria announced by the court of appeals. When a chemist gets a batch of litmus paper that *always* identifies a solution as basic, even when some of the samples tested are powerful acids, the chemist usually knows that the litmus paper is not much of a test. Similarly, when a court-announced rule has the effect of skewing results in one direction, it is time for this Court to consider whether that rule is the right one.

In another context this Court has taught that under some circumstances government may withdraw benefits from religious schools if their interpretations of Scripture conflict with overriding public policy concerns. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (denying tax-exempt status to school with student discipline policy proscribing interracial dating or marriage).[2] If the rule

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[2] Perhaps this Court may limit its teaching in *Bob Jones University* to racial discrimination. But serious commentators

announced by the court of appeals were correct, religious schools would be put in a double bind. As in *Bob Jones*, they could find their religion at odds with public policy and so must depart from religious practices or beliefs to maintain a government benefit. Alternatively, as in this case, if they are not sufficiently vigorous in asserting their distinctive religious identity in virtually every aspect of their educational mission, institutional policies, and curriculum, they stand to lose their ability to take religious convictions into account when they hire and fire their employees. Either way religious schools lose. When religious schools lose their distinctive character as a result of this governmental squeeze play, we all lose. Real diversity is not preserved by governmentally imposed uniformity. *Id.* at 609-10 (Powell, J., concurring in part).

B. The diversity of relationships between religious organizations and schools with a religious mission requires a broad construction of the exemption.

Quoting its earlier decision in *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988), the court of appeals concluded that "only those institutions with *extremely close ties to organized religion* would be covered." Pet. App. 5a (emphasis added). This criterion is flawed for three reasons. First, this Court has held squarely that

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have suggested, for example, that the Roman Catholic Church should lose its exempt status because its policy of ordaining only men as priests is at odds with the generally applicable proscription of employment discrimination on the basis of gender. *See* Mary Becker, The Politics of Women's Wrongs and the Bill of "Rights," 59 *U. Chi. L. Rev.* 453, 484-87 (1991); and Judith Miles, Beyond *Bob Jones*: Toward the Elimination of Government Subsidy of Discrimination by Religious Institutions, 8 *Harv. Women's L.J.* 31 (1985).

a claim for protection under the Free Exercise provision of the Religion Clause will not fail even though the claimant is not a member of any particular religious denomination. *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989). Since that is true for constitutional claims, it should likewise be true of claims arising under a statute that Congress enacted to extend an exemption to religious organizations for constitutional reasons. Second, the criterion implicitly involves the judiciary in a subtle preference for the sort of religion (hierarchical organizations) that are more likely to require "extremely close ties" between the church and an affiliated school. This violates the principle announced in *Larson v. Valente*, 456 U.S. 228 (1982), that government may not discriminate among religions. Third, the criterion requires too many religious organizations either to lay down on a Procrustean bed or else surrender the rights that Congress secured for them in § 702. To illustrate this third point, we offer now some actual examples of square pegs of differing size that cannot be jammed into the one round hole designed by the court of appeals.

Notre Dame University in South Bend, Indiana, is renowned nationally as a leading Catholic university. Like the vast majority of Catholic colleges and universities,[3] it is not owned, controlled or operated by the local

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[3] Of the approximately 220 Catholic colleges and universities in the United States, only 7 schools, 6 of which are seminaries, grant pontifical degrees, which entail a greater degree of control from the Vatican. Only 12 have any formal legal relationship to the local Diocese. The remaining 201 Catholic institutions of higher education were founded by a religious order and are typically governed by a self-perpetuating Board of Directors. Source: Association of Catholic Colleges and Universities.

Catholic Diocese of South Bend-Fort Wayne. It was founded in 1842 by the Congregation of the Holy Cross, and is now governed by an independent Board of Trustees, on which members of the Holy Cross Fathers retain a decisive vote. It aspires both to excellence as a leading research university and to maintain the Catholic character of the institution. *See, e.g.*, Edward McGlynn Gaffney and Philip R. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* 41-42 (1982) (statements of hiring policies by two Provosts at Notre Dame).

Colorado Christian University in Lakewood, Colorado, "emphasizes the integration of biblical principles into every aspect of the student's life." *Choose a Christian College* 27 (1992). It maintains a policy of mandatory attendance at chapel services by students and describes its goal as "preparing each student for a successful life of leadership and service." *Id.* It is not owned or operated by any particular religious organization, but describes itself as "interdenominational."

Gordon College in Wenham, Massachusetts is a Christian liberal arts college with a policy of mandatory chapel services. *New York Times* education editor Edward Fiske described it as a "major intellectual bastion of Protestant evangelicalism." *Choose a Christian College* 39 (1992). It is not owned or operated by any particular religious organization, but describes itself as "interdenominational."

John Brown University in Siloam Springs, Arkansas, maintains a policy of mandatory chapel attendance and promotes itself as follows: "With 120 international students and 80 Third World culture missionary's kids, JBU offers a global approach to Christian higher education right in northwest Arkansas." *Choose a Christian College* 48 (1992). It is "nondenominational."

Northwestern College in St. Paul, Minnesota, is the only nondenominational Christian liberal arts college in Minnesota. It requires chapel attendance and 45 credits of Bible-related courses. *Choose a Christian College* 67 (1992).

Taylor University in Upland, Indiana, maintains a policy of mandatory chapel three times per week. *Choose a Christian College* 83 (1992). Its academic program emphasizes "leadership development [and] a solid biblical foundation." Founded by Methodists in 1846, it no longer is controlled by the United Methodist Church and describes itself as "interdenominational."

Valparaiso University in Valparaiso, Indiana, is a nationally prominent Lutheran university. Although participation in chapel services is not mandatory, hundreds of the students and faculty members take part in these services each day during the school year. The university does not seek to have either a faculty or a student body that is composed exclusively of Lutherans, or even of a majority of Lutherans, but it strives to maintain its Lutheran character and reserves the right to take the religious convictions of employees into account in the hiring process. The university is operated by a lay Board of Directors, and is not owned or controlled by either of the two major Lutheran groups in America, the Lutheran Church-Missouri Synod or the Evangelical Lutheran Church in America.

Westmont College in Santa Barbara, California, defines its mission as providing "a program uncompromised in its commitment to a high-quality liberal arts education and integrated with enthusiastic, evangelical Christian faith." *Choose a Christian College* 91 (1992). It maintains a policy of mandatory chapel attendance, and describes itself as "nondenominational."

Wheaton College in Wheaton, Illinois is one of the country's best known evangelical colleges. Convinced

that "all truth is God's truth," it actively pursues the integration of Biblical Christianity with rigorous academic study in the liberal arts, with the goal of "serving Christ in this world." *Choose a Christian College* 92 (1992). It maintains a policy of mandatory chapel attendance, and describes itself as "nondenominational."

Under the rule of construction adopted by the court of appeals, *none* of these independent colleges and universities would be free to attempt to preserve a distinctive religious flavor as they engage in higher education.

Some of the Hebrew day-schools found in approximately forty states are attached in a formal legal manner to a synagogue. Most are not. Under the rule of construction adopted by the court of appeals, most of these yeshivas would not be free to preserve a distinctively Jewish atmosphere and ethos by maintaining an employment policy that prefers Jews over Gentiles.

C. The diversity of relationships between religious organizations and journals with a religious mission requires a broad construction of the exemption.

Religious traditions are not transmitted exclusively in the setting of a formal school. For example, many journals and periodicals in this country explore in a variety of ways the connections and relationships between religion and many aspects of modern life. *Amici* offer some examples of these publications, none of which is owned or controlled by any particular religious denomination, but each of which needs to have some flexibility in hiring its personnel in order to achieve its own mission.

America is a weekly journal of opinion edited by members of the Society of Jesus (Jesuits). It is not owned or operated by the Roman Catholic Archdiocese of New York.

The Christian Century is "an ecumenical weekly publishing articles by the most respected theologians, historians and church leaders," with a strong emphasis on the relationship of religion to social and political issues. It is edited by lay Protestants and is not owned or operated by any particular religious denomination.

Commentary is a monthly journal of opinion published by the American Jewish Committee. In sponsoring *Commentary*, the AJC does not purport to speak for Judaism in any, let alone all, of its branches, but aims to meet the need for a journal of significant thought and opinion on Jewish affairs and contemporary issues. The journal is not owned or operated by any synagogue or by any council of Rabbis or congregations.

Commonweal is a weekly journal of opinion edited by lay Catholics. It is not owned or operated by the Roman Catholic Archdiocese of New York.

First Things is a monthly journal of opinion exploring the connection between religion and public life. The editor in chief, Rev. Richard John Neuhaus, is a Roman Catholic priest; the editor, Dr. James Nuechterlein, is a Lutheran layman. It is not owned or operated either by Catholic or by Lutheran authorities, but by an independent publisher known as the Institute on Religion and Public Life.

The *Journal of Law and Religion* is a biannual publication of the Council on Religion and Law and Hamline University School of Law. The journal is not owned or operated by any religious denomination. Its editorial board is composed of Jewish, Catholic, Protestant, and Muslim scholars.

The *National Catholic Reporter* is a weekly newspaper of national circulation published since 1964 by lay Catholics in Kansas City, Missouri. It is not owned or operated by the Roman Catholic Diocese of Kansas City, a fact that has sometimes been lamented by Catholic bishops who regret the "liberal" tendencies of this newspaper.

Tikkun is a bimonthly Jewish critique of politics, culture, and society. Although many of the articles in this journal are not expressly theological, nearly all of them are susceptible to the characteristic Jewish perspective that religion pervades life. The journal is not owned or operated by any synagogue or by any council of Rabbis or congregations.

The *Wanderer* is a weekly newspaper of national circulation published since 1867 by lay Catholics in St. Paul, Minnesota. It is not owned or operated by the Roman Catholic Archdiocese of St. Paul-Minneapolis, a fact that has sometimes been lamented by Catholic bishops who regret the "conservative" tendencies of this newspaper.

Under the rule of construction adopted by the court of appeals, *none* of these religious journals or newspapers would, as a practical matter, be free to attempt by hiring policies to preserve a distinctive religious viewpoint as they engage in the effort to shape the culture through their dissemination of ideas.

We doubt that the EEOC would ever consider enforcing Title VII's ban on religious discrimination in employment against secular counterparts of these journals by requiring one of them to hire a religious believer. The net effect of this bias is an ideological tilt toward secularism that would leave secular journals free to discriminate against religious believers if they so chose, but would cripple religious journals by insisting that they hire people who are not sympathetic to their religious mission. This effect is clearly at odds with the teaching of this Court that secular speech may not be preferred over religious speech. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

II. When the Congress has refrained from regulating religious organizations by providing an exemption, the lower courts should not unduly narrow the scope of the exemption by a canon of construction that contradicts the Congressional mandate.

This Court has already addressed the statute at issue in this case. In *Corporation of Presiding Bishop v. Amos*, 487 U.S. 327 (1987), the Court turned back an Establishment Clause challenge to the validity of the exemption for religious discrimination by religious associations in Section 702 of Title VII of the Civil Rights Act of 1964. In the course of explaining why this provision is sound under settled First Amendment principles, the Court rightly deferred to the judgment of Congress that this exemption was consonant with the high regard for religious freedom that is central to our heritage.

The court of appeals not only ignored this Court's construction of § 702 in *Amos*[4]; it also ignored the approach of reading a statute to avoid constitutional difficulties, as suggested by this Court in *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

A. The narrow construction of the religious exemptions in Title VII severely threatens the ability of religious schools to make religiously-informed decisions to maintain their *bona fide* religious traditions.

One reason to grant the writ is that the decision of the court of appeals to narrowly construe and apply § 702

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[4] Remarkably, *Amos* is not even cited, let alone discussed, in the opinion of the court of appeals, Pet. App. 1a-19a, in the opinion of the district court, Pet. App. 20a-43a, or in the EEOC's determination, Pet. App. 44a-54a.

departs significantly from the teaching of this Court about the autonomy of religious bodies that arises as a *free exercise* concern. The burden imposed on religious bodies by the operation of the wooden rule of construction announced by the court of appeals would not typically arise out of a conflict of religious conscience vis-a-vis a general command of the government. Rather, the problem lies in the severe erosion of the *autonomy* of religious bodies in determining their own policies, articulating their own voices, and pursuing their own paths free from needless governmental intervention in their affairs.

Catholic Bishop of Chicago, supra, illustrates this sort of concern. The right of workers to organize and bargain collectively with employers has been a central feature of Roman Catholic social teaching for over a century. Hence, the problem with the government's assertion of jurisdiction over the Catholic schools in that case was not that Catholics are conscientiously opposed to collective bargaining, but that they need the freedom to operate their schools in the way they see fit without undue outside interference, whether from the government or third parties like a union. *See* Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 *Colum. L. Rev.* 1373 (1981).

The interference here with the ability of religious schools to carry on their mission as they see fit is not trivial. The right to hire faculty with religious background and convictions is crucial to the educational mission of a religious school. Indeed, this right defines that mission in practical terms, for the loftiest statement of purpose will remain an empty formula unless it is implemented by personnel committed to the promotion of the religious mission of the school. *See* Gaffney and Moots,

Government and Campus, 32-44 (1982) (offering rationale for religious preference in hiring at religious schools). Accordingly, the *Amos* court recognized in § 702 "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. 327, 335 (1987); *and see* at 348-349 (O'Connor, J., concurring) (1987).

By constricting the reach of the religious exemption that Congress extended to religious institutions in § 702, the court of appeals would impose a significant burden on the right of these religious institutions to pursue their mission with people committed to that mission. As we illustrate above (Part I B) with examples from around the country, the resulting injury to religious schools would be severe.

B. The narrow reading of the religious exemptions in Title VII imposed by the court of appeals would excessively entangle the government in religious matters.

A second reason to grant the writ is that the decision of the court of appeals departs significantly from the rationale for religious autonomy articulated by this Court in *Amos* as a *non-establishment* concern. Mainly in the school aid cases, the Court has worried whether federal or State financial assistance to religious schools would entail excessive monitoring and surveillance of these institutions, resulting in excessive entanglement between the government and religion in violation of the Establishment provision of the Religion Clause. The mere possibility that this *might* occur, even where there is no evidence for decades that it has *actually* occurred, apparently suffices to invalidate a program. *See, e.g., Aguilar v.*

Felton, 473 U.S. 402, 413 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 613-614 (1971).

The court of appeals would permit a school to be covered under the statutory exemption only if a federal judge – or much more likely, a federal employee of the EEOC[5] – determines that the institution is "primarily religious." Pet. App. 5a, citing *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618-619 (9th Cir. 1988). But forcing the distinction between the "primarily religious" and the "primarily secular" is the very sort of inquiry that Congress sought to avoid in enacting § 702. There is nothing secular but secular thinking makes it so. And there is nothing religious but religious interpretation makes it so. Hence the test that the Ninth Circuit – and no other federal court of appeals – has adopted is by no means a facile distinction. On the contrary, under the clear teaching of this Court in *Amos*, 483 U.S. at 336, it is itself problematical.

A pernicious effect of the rule announced by the court of appeals is that it would enable judges or governmental officials in the EEOC to impose their own values about religion and secularity, or about the "right" blend in the relation between religion and secularity, upon religious institutions that the Congress has, to date, left free from regulation.

On the one hand, individual judges or EEOC officials might engage in the exercise of dividing the "primarily

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[5] Not all religious institutions may be assumed to have the resources to litigate every threat to their autonomy, any more than every newspaper may be assumed to have the resources to fight every threat of a libel action. The potentially deleterious effect on religious freedom that is latent within the Ninth Circuit's standard is just as real as the chilling effect that this Court has recognized in the free press area. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964).

religious" from the "primarily secular" out of a motivation to encourage religious bodies to be more authentically religious. These judges and officials would certainly be free to voice this concern as members of those religious bodies. But under our constitutional order, it is plainly not their duty to impose their views of what is "truly" religious on the religious communions themselves. As Chief Justice Burger wrote in *Thomas v. Review Board*, 450 U.S. 707 (1981):

> "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . . Courts are not arbiters of scriptural interpretation."

Id. at 714, 716. *See also Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (renouncing "departure from doctrine" standard for resolution of intragroup religious disputes); *Watson v. Jones*, 13 Wall. 679 (1872).

On the other hand, it is also possible that judges or EEOC officials might embark upon their mission of dividing the world of religious institutions into those which are "primarily religious" and those which are "primarily secular" with the goal of sanitizing them of politically incorrect religious distinctives. But the result would be equally unconstitutional: religious institutions would be forced to abandon a religious right, namely, to exercise a religious preference in employment decisions. Congress

did not manifest any such intent. The subtle but ineluctable effect of the lower court's narrow interpretation of § 702 is to diminish religious influence in society by requiring religious institutions, through their hiring practices, to become over time more "secular" than the law now requires them to be. This patently advances a form of secularism through judicial engineering that is hostile to any significant role for religion in our culture. The fact that this potential effect of the ruling below is itself at odds with the clear and repeated teaching of this Court that the government may no more *inhibit* religion than it may advance it, *see, e.g.*, Edward McGlynn Gaffney, Hostility to Religion, American Style, 42 *DePaul L. Rev.* 263, 266, n. 21 (1992) (citing cases), constitutes an independent ground for the Court to grant the writ.

C. The narrow reading of the religious exemptions in Title VII imposed by the court of appeals is clearly at odds with the canon of construction adopted by every other court of appeals.

Another reason to grant the writ is that the decision of the court of appeals conflicts with the canon of construction of Title VII adopted by every other court of appeals that has explored this matter. *See Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) ("with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the [§ 702] exemption broadly"), and *EEOC v. Mississippi College*, 626 F.2d 477, 487 (5th Cir. 1980) ("the exemption granted to religious institutions by § 702 . . . must be construed broadly to exclude . . . any employment decision made by a religious institution on the basis of religious discrimination"). *See* Pet. 12-15.

To leave intact the reasoning of the court of appeals would not simply erode the protection that Congress

gave to religious organizations and their schools throughout the vast territory of the Ninth Circuit. It would send exactly the wrong signal to the predominantly secular employees of the EEOC that the hunting season has opened for diminishing genuine religious pluralism throughout the country and substituting an ersatz form of "diversity" on institutions that the government should leave alone.

CONCLUSION

Neither diversity nor religious liberty is preserved by governmentally imposed uniformity. The Constitution and Congress' intent should not be so easily subverted by the Ninth Circuit. For the reasons stated above, the Court should grant the petition for writ of certiorari.

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The Christian Legal Society, founded in 1961, is a nationwide nonprofit professional association of 4,800 Christian attorneys, judges, law students and law professors. Since 1975, the Society's legal advocacy and information arm, the Center For Law And Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the autonomy of religious institutions in employment and other religiously-informed means of advancing their mission.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident" truth that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty.

The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Indeed, the Declaration states that

citizens have a duty to rebel and establish a new government if this right (or any other inalienable right) is abridged by the state. Hence, the unequivocal and nonnegotiable prohibition attached to this, our First Freedom: "Congress shall make **no** law . . . "

The Catholic League For Religious And Civil Rights is a civil rights organization which is national in membership and was organized to combat all forms of religious prejudice and discrimination. The League supports the religious freedom rights of Catholics and others through a wide range of activities. In pursuit of these interests, the League has filed amicus briefs with this Court urging expansive protection of religious freedom in employment. The League believes it is essential for religious educational institutions to enjoy the freedom to hire employees who share their religious traditions and beliefs free of governmental interference, so that the distinctive educational mission of such institutions can be preserved.

The Christian College Coalition is an association of 85 accredited and independent private colleges and universities of the arts and sciences. Some are nationally and regionally recognized institutions of higher education. Its member schools represent more than 30 denominational affiliations. Thirteen of its colleges are interdenominational or nondenominational in character and by religious commitment. The Coalition requires each member school to provide a traditional liberal arts program with a clear statement of Christian mission. Each member school must exercise a religious preference in employment decisions.

Christian Life Commission of the Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.2 million members in over 38,200 autonomous local churches. The Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.

The Episcopal Church In Hawaii was founded in 1862 by King Kamehameha IV and Queen Emma. It has approximately 7,000 parishioners in 41 parishes and missions. The church maintains parochial and diocesan schools, day care centers and shelters for the homeless. The Church views its ability to remain autonomous in hiring and retaining lay employees to be essential to its mission. To do so, it and other religious organizations must remain free from unnecessary governmental interference in its internal affairs.

The National Association of Evangelicals is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The University of Notre Dame University in South Bend, Indiana, is renowned nationally as a leading Catholic university. It is not owned, controlled or operated by the local Catholic Diocese of South Bend-Fort Wayne. It was founded in 1842 by the Congregation of the Holy Cross, and is now governed by an independent Board of Trustees, on which members of the Holy Cross Fathers retain a decisive vote. It aspires both to excellence as a leading research university and to maintain the Catholic character of the institution.

Valparaiso University in Valparaiso, Indiana, is renowned nationally as a leading Lutheran university. The University is operated by a lay Board of Directors, and is not owned or controlled by either of the two major Lutheran groups in America, the Lutheran Church-Missouri Synod or the Evangelical Lutheran Church in America. Founded in 1859 as an independent university, Valparaiso University was purchased in 1925 by The Lutheran University Association, an independent group of lay Lutherans. It aspires to excellence as a comprehensive university, and it strives to maintain its Lutheran character by taking the religious convictions of employees into account in the hiring process when it deems that appropriate. The by-laws of the University require that 75% of the members of the Board of Directors must be communicant members of a Lutheran congregation.

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No. 93-171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM, MICHIGAN ASSOCIATION OF CHRISTIAN SCHOOLS, INC., WEIMAR INSTITUTE, INC., AND OUTPOST CENTERS, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by government which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom.

The Council is a membership organization with dues paying members located throughout the United States. The board of directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion to the greatest extent permissible in a complex society, whether that interference be from the executive, legislative, or judicial branches of government.

The Michigan Association of Christian Schools, Inc. is a nonprofit corporation which includes approximately 60 Christian schools as members. Some of those schools are not church-operated, managed, or controlled. Each of the schools requires its teaching staff to adhere to Christian beliefs and practices.

Weimar Institute is an independent organization of individual Seventh-day Adventists who are dedicated to the operational propagation of holistic Christian living. It is committed to support the ministry of the

Seventh-day Adventist Church. It operates a training school at Weimar, California.

Weimar Institute does not discriminate in employment because of race, color, sex, age, national origin or handicap. However, as a nonprofit organization owned and operated by individuals who are Seventh-day Adventists for the express purpose of fulfilling the unique mission given to the Seventh-day Adventist Church, Weimar Institute reserves the right to restrict its hiring to members in good standing of the Seventh-day Adventist Church who have a sincere concern for the spiritual, moral, social, educational and health principles and practices as expressed by the Institute.

Outpost Centers, Inc. ("OCI") is composed of 90 nonprofit member organizations in 27 countries of the world. OCI is not owned or operated by the Seventh-day Adventist Church. But its board is composed exclusively of individuals who are members of the Seventh-day Adventist denomination. Among the member organizations are three secondary schools located within the United States: Laurelwood Academy located in Gaston, Oregon; Castle Valley Academy located at Moab, Utah; and Laurelbrook Academy located at Dayton, Tennessee. Another member organization, Country Life Vocational School located at Portage, Wisconsin, provides vocational training for secondary students. In addition, there are five member organizations within OCI operating as adult training schools. These include Eden Valley Institute located at Loveland, Colorado; Wildwood Institute located at Wildwood, Georgia; Living Springs Retreat located at Putnam Valley, New York; Uchee Pines

located at Scale, Alabama; and Poland Spring Health Institute located at Poland Spring, Maine.

Each of the member organizations of OCI works in harmony with the teachings of the Seventh-day Adventist Church. All board members and employees are required to be members in good standing of the Seventh-day Adventist Church.

SUMMARY OF ARGUMENT

The Ninth Circuit has narrowly construed the section 702 exemption for religious educational organizations. In determining whether such an institution qualifies for this exemption allowing it to discriminate in hiring on the basis of religion, the Ninth Circuit gives considerable weight to whether the institution is owned, supported, controlled, or managed by an organized church.

It is the staff of such an educational institution that is the major contributing factor to the school's religious atmosphere. And it is the staff which has the greatest impact on the student body. The Ninth Circuit's interpretation of section 702, however, interferes with the inherent right of the religious educational institution to determine how it will inculcate religious values.

The court of appeals recognized that religious instruction provided at Kamehameha Schools was provided by religious education teachers and that boarding students were required to attend services at the Bishop Memorial Church. The fact that the schools did not choose to adopt a hard sell approach to religious education should not prevent Kamehameha

Schools from teaching religion through the use of Protestant role models.

The Ninth Circuit's approach will result in judicial evaluation of the degree of religiosity found in the schools with fine line-drawing resulting in the type of entanglement which this Court has sought to avoid.

Clearly, the religious program of the Kamehameha Schools is sufficiently religious to prohibit direct governmental aid to the schools. If Kamehameha Schools are prohibited from receiving direct government grants because of their religious atmosphere and conduct within the schools, the government should be barred from imposing itself into school staffing and dismissal matters.

A narrow interpretation of section 702 requires a case-by-case evaluation of each non-church operated school with each institution being a potential target of a discrimination claim. Because there is a split in the circuits concerning whether the exemption proviso should be narrowly or broadly construed, and hundreds of educational institutions are now at risk, this Court should grant the writ of certiorari and settle the question.

ARGUMENT

THE NARROW INTERPRETATION BY THE NINTH CIRCUIT OF THE EXEMPTION FOR RELIGIOUS EDUCATIONAL INSTITUTIONS SET FORTH IN SECTION 702 OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, THREATENS THE RELIGIOUS AUTONOMY OF RELIGIOUS EDUCATIONAL INSTITUTIONS OPERATED BY NON-CHURCH ORGANIZATIONS.

The Ninth Circuit essentially ruled that the section 702 exemption for religious educational institutions,

as set forth in 42 U.S.C. § 2000e-1(a), must be narrowly construed. *EEOC v. Kamehameha Schools/ Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993); App. 5a.[1] In determining whether a religious educational institution qualifies for a section 702 exemption permitting it to discriminate in hiring on the basis of religion, the Ninth Circuit gives considerable weight to whether the educational institution was ever owned, supported, controlled, or managed in whole or significant part by a religious denomination. *See Kamehameha*, 990 F.2d at 461 n.7; App. 7a n.7.[2]

Neither amicus Weimar Institute, Inc. nor the educational institutions operated by member organizations of amicus Outpost Centers, Inc. are owned, supported, controlled or managed in whole or in significant part by the Seventh-day Adventist Church or any other religious denomination. Likewise, some of the schools that are members of Michigan Association of Christian Schools are not church-owned and/or -

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[1] References to the Appendix "App. 00a" are to the Appendix appearing in the Petition for a Writ of Certiorari filed by petitioner.

[2] The Ninth Circuit, citing *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988), agreed with the EEOC that section 2000e-1(a) does not exempt an organization that is "merely 'affiliated' with a religious organization." It also concluded "that only those institutions with extremely close ties to organized religion would be covered. Churches, and entities similar to churches, were the paradigm. *Id.* at 618." *Kamehameha*, 990 F.2d at 460; App. 5a. EEOC, in its Determination applying *Townley*, concluded that Kamehameha was not exempt under section 702 even though it stated that "[i]t is clear from the evidence submitted during the investigation . . . that the schools have a religious orientation that is similar to that found in most church-schools." App. 52a at n.8.

operated. Nevertheless, all of these educational institutions seek to project a religious influence through a selection of staff based upon their individual membership in and commitment to the beliefs and teachings of their particular faiths.

Amici believe that the religious atmosphere of an educational institution is in major part determined by its teachers and other personnel. This concept was clearly articulated by a Catholic School official who wrote:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities, or the religious classes, or the students—at least not chiefly. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves to the totality of curriculum . . . .
>
> When the student comes to the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible, is the spirit created by the common Christian life conscientiously lived by the faculty and participated in by the students.

J. Leibrecht, *Thoughts on the Catholic School*, The Catholic Educator 27, 28, 33 (May, 1966).

Professor Donald A. Giannella expressed a view similar to that embraced in this Court's decision in *Meek v. Pittenger*, 421 U.S. 349 (1975):

> [A]s a recent study of Catholic parochial education points out [Notre Dame Report, Catholic Schools in Action, 17 (R. Neuwien ed. 1966)]: "the very presence of the religious [teachers and administrators] is in itself a dominant, unforgettable symbol." This pervasive atmosphere makes on the young student's mind a lasting imprint that the holy intranscendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate interest in religious vocations.
>
> In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the disqualifying religious function of molding the religious personality of the young student.

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 574 (1968).

To many educational institutions, it is the selection criteria for the staff that has the greatest impact on the students. Certainly, the character of the school is determined more by the faculty of the school than

by a formalistic determination focused upon the school's ownership. At Kamehameha Schools, the established plan was to teach Protestant religious values by daily contact through the use of Protestant role models. App. 31a-32a, 37a.

Justice Douglas in *Lemon v. Kurtzman*, 403 U.S. 602, 630-31 (1971), recognized that sectarian education may involve indoctrination of religious teachings either "delicately and indirectly, or massively through doctrinal courses." The Ninth Circuit's determination that a section 702 exemption in the hiring of teaching staff hinges, at least in part, on whether an educational institution seeking to impart religious values decides to accomplish that "delicately or indirectly" or through the hard sell. But that is both a spiritual and educational determination that should be left to the school itself. The Ninth Circuit's interpretation of section 702 would inhibit a private school from utilizing the most important factor in creating a religiously based environment in an educational institution—that being a religiously based selection of faculty.

The Ninth Circuit recognized that religious instruction at Kamehameha Schools was provided by religious education teachers from kindergarten through the sixth grade. *Kamehameha*, 990 F.2d at 463; App. 10a-11a. It stated:

> The present teacher describes her work as "an important opportunity to expose children to the Christian faith. The emphasis is not on any 'religion' but to teach the basic truths about how God and through his son Jesus Christ teaches us how to live a joyous and fulfilling life."

Id. at 11a. The court of appeals also noted that all boarding students were required to attend Sunday services at the Bishop Memorial Church. *Kamehameha*, 990 F.2d at 462; App. 10a. The fact that the Kamehameha Schools decided to provide religious education to its students "delicately and indirectly" should not prevent it from providing an educational program consistent with its religious views.[3]

This Court last decided a case involving section 702's religious exemption in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In that case, this Court rejected an Establishment Clause attack on the statutory exemption provision. Professor Laurence Tribe discussed this Court's decision in *Amos* and compared it with this Court's decision in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which found a state Sabbath accommodation exemption to be unconstitutional. Professor Tribe noted that in *Amos* the section 702 exemption "reduces regulatory entanglement between church and state." L. Tribe, *American Constitutional Law* 1198 (2d ed. 1988). He further said:

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[3] The district court in its decision, finding that Kamehameha Schools were entitled to a section 702 exemption, observed:

> Indeed, the President of Kamehameha Schools averred that the "daily contact with Protestant role models, prayer before meals, devotionals, required religious courses, the Bishop Memorial Church and chapel on campus, religious programs of the school, deputation teams, and religious extra-curricular activities all speak to the degree to which religion plays a role at Kamehameha." Affidavit of Michael Chun, President of Kamehameha Schools.

App. 37a-38a.

> The *Amos* majority noted that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." In that respect, as Justice O'Connor noted, government is lifting two separate burdens from religion: the burden of Title VII's requirements, and the burden of having to demonstrate that a given activity is religious. Whereas the *Amos* statute sought to reduce the entanglement between a religious community and the government, by minimizing the occasions for government scrutiny of the community's activities, the *Thornton* statute could claim no such justification. . . .

Id. It is exactly this concern which Professor Tribe observed—that is the chilling effect visited on a religious organization having to predict which of its activities a secular court will consider religious—which amici claim requires a broad interpretation of the section 702 exemption.

Professor Donald Giannella has observed that a determination of the degree of religiosity found in an elementary or secondary school would involve the judiciary in the kind of entanglement which this Court has been trying to avoid in First Amendment cases. Professor Giannella also stated that if a highly refined and particularistic test were adopted by the Court with reference to the religiosity of the schools, some schools would inevitably register plausible complaints of invidious discrimination or lack of equal treatment. Giannella suggests that when judicial decisions turn on such "elusive" and "ephemeral" matters concern-

ing religion, entanglement becomes excessive, and equal treatment of religion in schools is seriously endangered. Giannella, *Lemon and Tilton: The Bitter and the Sweet of the Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 181.

As the district court noted, Kamehameha Schools have a curriculum directed toward the propagation of the Protestant religion. It requires Sunday church attendance for boarders and weekly chapel attendance for all students. It requires prayer before all meals and school events and has required religious education for 104 years. Certain of Kamehameha's courses are taught by either Christian education teachers or ordained Protestant ministers. School publications contain religiously-oriented material, and the schools themselves encourage and sponsor participation by students in religious organizations. App. 40a at n.6. If direct governmental aid were to be funneled to Kamehameha, it would be struck down as unconstitutional under *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); and *Aguilar v. Felton*, 473 U.S. 402 (1985).[4]

In *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977), the court observed that "an even-handed approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools

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[4] The Bishop Memorial Church is attended by Kamehameha students and is located on the school campus. App. 37a, 40a at n.6. The church building and its services on campus stand as an ongoing symbol of the religious character of the educational institution and add to the school's religious atmosphere. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390-91 (1985).

should not now be any less effective to ward off the inhibiting effect of the governmental regulations here involved." If Kamehameha Schools are prohibited from receiving direct government grants because of their religious atmosphere and conduct within the schools, the government should be barred from imposing itself into school staffing and dismissal matters.

Section 702 lifts from "a religious corporation, association, educational institution, or society" a governmentally imposed burden relative to employee selection. A narrow interpretation of section 702 tends toward selectivity in drawing fine lines between those institutions that fall within and those outside of the exemption. *See* L. Tribe, *American Constitutional Law* 1200-01 (2d ed. 1988).

A narrow interpretation of section 702 also results in practical problems affecting organizations such as the amici here which are not church organizations but which nevertheless operate educational institutions with a religious perspective and have throughout their history selected faculty and staff who reflect their sectarian views. But with a narrow interpretation of section 702 and a case-by-case evaluation by EEOC, any non-church operated school has the potential of being the target of a discrimination claim when, in the carrying out of its mission, it selects teachers and staff with a sectarian view. The hundreds of organizations operating educational institutions espousing religious viewpoints but including religion in their operations in a variety of ways, some to a greater and some to a lesser extent, impels resolution by this Court of the section's interpretation. This is especially true when, as noted in petitioner's brief, there is a

split in the circuits relative to whether the exemption should be narrowly or broadly construed.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the court of appeals should be reversed.

Dated: October 15, 1993 Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the schools operated by petitioner do not have a primarily religious purpose and character, and therefore are not entitled to engage in religious discrimination under the exemption for religious educational institutions provided by Section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-171

KAMEHAMEHA SCHOOLS/BISHOP ESTATE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 990 F.2d 458. The opinion of the district court (Pet. App. 20a-43a) is reported at 780 F. Supp. 1317.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1993. A petition for rehearing was denied (and the opinion amended) on May 10, 1993. Pet. App. 55a-56a. The petition for a writ of certiorari was filed on August 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a trust created in 1884 by the will of Bernice Pauahi Bishop, a member of the former Hawaiian royal family, to establish and operate the Kamehameha Schools in order "to provide * * * a good education in the common English branches, and also instruction in morals and such useful knowledge as may tend to make good and industrious men and women." Pet. App. 2a & n.1. The will directed that "the teachers of said schools shall forever be persons of the Protestant religion," but did not restrict selection to "any particular sect of Protestants." *Id.* at 2a n.1.

Petitioner opened a school for boys in 1887 and one for girls in 1892. C.A. App. 37. In 1965, the schools were consolidated into a single co-educational institution with elementary and secondary schools.[1] *Id.* at 37-38. Since their founding, the schools have been continuously supported, controlled and managed by petitioner through its board of trustees. *Id.* at 38. No Protestant or other religious denomination owns, supports, controls or manages either petitioner or the schools. *Id.* at 42.

In the 1989-1990 academic year there were 3,041 full-time students enrolled in the schools (C.A. App. 45), only 32% of whom were Protestants (*id.* at 47-48). The schools run a number of part-time or supplemental educational programs (including summer programs, elementary enrichment programs for Hawaiian students in public schools, adult education

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[1] The abandonment of separate facilities for boys and girls violated the facial terms of the will and required approval, which petitioner sought and received, from the state courts. See Pet. App. 18a n.18; C.A. App. 37-38.

classes, and post-secondary scholarships and counseling for Hawaiian students who did not attend the schools), which in 1989-1990 reached almost 17,000 students, as well as several other general educational activities (including a Hawaiian Lecture Series, a Hawaiian Studies Institute, the Native Hawaiian Drug Free Schools and Community Program, college counseling services provided in public schools, and a Native Hawaiian Higher Education Demonstration Program), which in 1989-1990 reached another 22,000 participants. *Id.* at 50-51. The record does not reflect what percentage of the administrators, faculty, staff or participants in these programs are Protestant. Several of the schools' collateral programs (including the Prevention of School Failure program and hearing screening, college counseling, and post-secondary counseling and financial aid programs for native Hawaiian students in public schools) receive federal funding. *Id.* at 53. The schools do not apply the will's Protestant-only requirement to positions in such programs. *Ibid*; see also *id.* at 49; Pet. App. 17a n.17.

Petitioner's full-time students are exposed to an ordinary secular curriculum, but are required to take one course in religion each year, involving about one 30-minute class period per week. Pet. App. 10a-12a. Boarding students are also required to attend religious services on Sundays. *Id.* at 10a. In addition, teachers of kindergarten through eighth grade classes lead their students in a daily prayer before lunch, and boarding students say grace before school dinners. *Ibid.*; C.A. App. 46. The schools do not endeavor to convert the non-Protestant students who constitute the large majority of the student body. Pet. App. 10a; C.A. App. 48.

The schools' faculty includes a chaplain, who is an ordained Protestant minister. C.A. App. 39; see Pet. App. 9a. Since 1907, the chaplain has been the minister of the Bishop Memorial Church, a church on the school campus which is a member of the Hawaii Conference of the United Church of Christ. C.A. App. 42; see Pet. App. 9a, 7a n.7. The Bishop Memorial Chapel, located on campus, is used both for the Bishop Memorial Church's Sunday services and for the schools' weekly chapel services. C.A. App. 43-44; see Pet. App. 10a, 11a & n.10. During the 1989-1990 school year the 71 members of the Bishop Memorial Church included none of the schools' students, and only 19 out of the approximately 250 full-time faculty members. C.A. App. 44-45.

Prior to 1988, all applicants for teaching positions that the schools consider subject to the Protestant-only requirement were required to provide at the time of hire either a baptismal record or a letter from a minister attesting to the applicant's membership in a Protestant church. Pet. App. 9a. More recently, applicants have been required to provide only a statement certifying their "membership in the Protestant religion," unless the schools specifically request further proof of affiliation. Since 1988, no applicant or teacher has been asked to provide such additional proof. *Ibid.*; C.A. App. 41. The schools have never required that teachers maintain active membership in a church, and no inquiry is ever made into the substance of a teacher's beliefs or the extent to which teachers integrate those beliefs into their teaching (or into their personal lives). Pet. App. 9a; C.A. App. 41.

2. Petitioner's policy of hiring only Protestant teachers completely barred Carole Edgerton from

competing for a vacant position as a substitute French teacher at the schools. Pet. App. 2a-3a. Edgerton complained to the Equal Employment Opportunity Commission that petitioner's policy discriminated against her on the basis of her religion. *Ibid.* When the Commission attempted to mediate the dispute, petitioner maintained that it was bound by the terms of Mrs. Bishop's will. *Id.* at 3a. The Commission then filed this action against petitioner, alleging that the Protestants-only policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 3a.

The district court granted petitioner's motion for summary judgment. Pet. App. 20a-43a. Applying (*id.* at 33a-38a) the test adopted by the court of appeals in *EEOC* v. *Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989), the district court concluded that the schools' "purpose and character" were "primarily religious" (Pet. App. 33a, 37a), and that the schools were therefore "religious * * * educational institution[s]" permitted to discriminate in employment on the basis of religion under Section 702(a) of the Civil Rights Act, 42 U.S.C. 2000e-1(a) (1988 & Supp. III 1991). Pet. App. 38a.[2]

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[2] The district court also held that petitioner's policy did not violate Title VII because being Protestant was a "bona fide occupational qualification" for teaching at the schools (Pet App. 24a-32a), and because it found that the schools' curriculum was "directed toward the propagation of a particular religion" (*id.* at 39a-43a). See 42 U.S.C. 2000e-2(e)(1)-(2). The court of appeals rejected both of these arguments, Pet. App. 12a-18a, and petitioner does not renew them in this Court. Pet. 7 n.5.

The court of appeals reversed. Pet. App. 1a-19a. The court reaffirmed (*id.* at 5a) the *Townley* approach, followed by the district court, of weighing "[a]ll significant religious and secular characteristics * * * to determine whether the corporation's purpose and character are primarily religious." *Townley*, 859 F.2d at 618. The court disagreed, however, with the district court's application of the *Townley* test to the specific facts of this case. Pet. App. 5a. After reviewing (*id.* at 7a-12a) the schools' "ownership and affiliation, purpose, faculty, student body, student activities, and curriculum," the court of appeals found those factors "either essentially secular, or neutral as far as religion is concerned." *Id.* at 6a. The court concluded that the schools are "an essentially secular institution operating within an historical tradition that includes Protestantism."[3]

[3] In particular, the court noted that "[n]o religious organization has ever controlled or supported the Schools" (Pet. App. 7a); that "the purpose and emphasis of the Schools have shifted over the years from providing religious instruction to equipping students with ethical principles that will enable them to make their own moral judgments" (*id.* at 8a); that, while petitioner adheres to the Protestant-only rule, the schools "have never required their teachers to maintain active membership in a church, and do not inquire into the substance of a teacher's beliefs or the extent to which teachers integrate those beliefs into their work" (*id.* at 9a); that petitioner does "not consider the religious affiliation of prospective students on or off campus" (*ibid.*); that students participate in a wide range of extracurricular activities, most of which are non-religious (*id.* at 9a-10a); that the curriculum "offer[s] a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective," and that students must fulfill only "a limited religious education requirement" consisting of "minimal, largely comparative religious studies" (*id.* at 10a, 12a).

Id. at 12a. Accordingly, the court held that the schools' "purpose and character [are] primarily secular, not primarily religious," *ibid.*, and that petitioner is therefore not entitled to engage in religious discrimination as a "religious * * * educational institution" under Section 702(a).

ARGUMENT

1. Petitioner contends that the decision below conflicts with the decisions in *Little* v. *Wuerl*, 929 F.2d 944 (3d Cir. 1991), and *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981). Neither of those decisions dealt with the issue involved in this case.

This case involves the question whether an employer is a "religious * * * educational institution" within the meaning of Section 702. *Little*, on the other hand, was a suit against the Roman Catholic bishop of Pittsburgh, as owner and operator of a local Catholic school, and challenged the statutory right of that concededly religious school (see 929 F.2d at 948) to discriminate on the ground that a teacher's second marriage violated Catholic teachings. *Id.* at 946. In *Mississippi College*, the parties similarly did not dispute the religious character of the College, which was owned and operated by the Mississippi Baptist Convention. See 626 F.2d at 478-479, 481, 484-486, 487. The decisions in those cases are thus irrelevant to the question of whether an employer is a religious institution entitled to assert exemption under Section 702.[4]

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4 Little involved "what it means for someone to be 'of a particular religion'" for purposes of the exemption afforded to religious employers by Section 702. 929 F.2d at 950. Mississippi College considered and rejected the EEOC's contention

In fact, the question presented in this case does not appear to have arisen frequently. In most cases involving the Section 702 exemption, as in *Little* and *Mississippi College*, the employer's status as a "religious * * * institution" is conceded or clear.[5] See *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 330 n.3 (1987); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164,

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that "the College's mere assertion that it declined to hire [a teacher] because of her religion should not prevent it from investigating to determine if the College used [the teacher's] religion as a pretext for some other form of discrimination." 626 F.2d at 484.

[5] In all of the cases cited in the text, the employer in question was either a church or an entity owned, controlled or operated by a church. As the court of appeals recognized (Pet. App. 6a n.5), a school not owned, controlled or operated by a church may still qualify as a "religious * * * educational institution" for purposes of Section 702. Petitioner is thus wrong in arguing (Pet. 15) that the decision below renders Section 702 redundant because of the provision in Section 703(e)(2) (42 U.S.C. 2000e-2(e)(2)) that a school may hire employees of a particular religion if either "[it] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation," or "the curriculum * * * is directed toward the propagation of a particular religion." Under the Ninth Circuit's construction, Section 702 goes further than Section 703(e)(2) by exempting any school, regardless of ownership or the active propagation of a particular religion, so long as its "purpose and character" are nevertheless primarily religious. Moreover, while neither the appropriate line of demarcation between the two Sections nor the test petitioners propose for determining coverage under Section 702 is particularly clear, the vague "broad construction" that petitioners urge (Pet. 15) would seem at least as likely to render the two sections duplicative, by allowing Section 702's general exemption to swallow the specific requirements of Section 703.

1164-1165 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); *EEOC* v. *Fremont Christian School*, 781 F.2d 1362, 1364 (9th Cir. 1986); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1274-1275, 1277 (9th Cir. 1982); *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 279 (5th Cir. 1981). See also *Townley*, 859 F.2d at 618. So far as we are aware, *Townley* and the decision below are the only two appellate decisions in which an employer's religious status for purposes of Section 702 has been seriously at issue.[6]

2. In the court of appeals, both parties accepted the authority of *Townley* (Pet. C.A. Br. 16; Gov't C.A. Br. 13), petitioners arguing only that "upon a careful balancing of all significant characteristics, both religious and secular, the purpose and character of [the schools] is primarily religious." Pet. C.A. Br. 18. The court of appeals conducted the fact-specific balancing urged by petitioners, but reached the opposite conclusion. In this Court petitioners now claim for the first time that the *Townley* test improperly "requires, for any exemption under Section 702, that courts and the EEOC make extremely intrusive inquiries into religious matters." Pet. 15. Petitioners have waived that argument. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992); *Adickes* v. *S.H. Kress & Co.*, 398

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[6] See also *Fike* v. *United Methodist Children's Home*, 547 F. Supp. 286 (E.D. Va. 1982) (holding that the defendant had become too secular to qualify for exemption under Section 702, but that on the facts of the case it had not discriminated on the basis of religion), aff'd, 709 F.2d 284 (4th Cir. 1983) (considering only the latter ground).

U.S. 144, 147 n.2 (1970). It is not, in any event, persuasive.

When a legislature must choose between applying a statute to religious organizations or exempting such organizations, "[e]ither course * * * occasions some degree of involvement with religion." *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970). Exemption—the approach that Congress took in Title VII—is generally the course that raises fewer constitutional concerns, because it "effectuates a more complete separation" between church and state. *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. at 339. But religious exemptions inevitably carry with them the need to determine who is exempt.

Section 702 creates an exemption from the prohibition against religious discrimination for "religious" organizations. Where an organization asserts that it qualifies for that exemption, a court called upon to resolve the issue must necessarily determine whether the organization is "religious." The court of appeals' approach (Pet. App. 5a) of weighing the organization's religious and secular characteristics in order to determine its primary "purpose and character" is eminently sensible. Petitioner itself suggests no more appropriate methodology, and none occurs to us.[7]

This Court has explicitly recognized that courts may be called upon to conduct inquiries similar to

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[7] Petitioner insists (Pet. 14-15) that Section 702 should be given a "broad" rather than a "narrow" construction. Altering the breadth of the exemption, however, would not alter the need to conduct *some* inquiry into whether the employer is a "religious" organization, unless the trial court is simply to accept an employer's bald assertion, or its evidence of *any* religious content in its program (cf. Pet. i), as legally conclusive.

that undertaken by the court of appeals in this case. For example, in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), the Court affirmed a factual determination that the petitioner foundation's business activities were commercial rather than religious (and therefore subject to the requirements of the Fair Labor Standards Act), while approving a judicial inquiry that scrutinized "the activities at issue by reference to objectively ascertainable facts concerning their nature and scope." *Id.* at 299. Questions arising under the Establishment Clause may similarly require judicial evaluation of the religious and secular aspects of particular institutions or activities. See *Roemer* v. *Board of Public Works*, 426 U.S. 736, 755-761 (plurality opinion), 768-769 (White, J., concurring in the judgment) (1976) (determination of whether certain Catholic colleges were "pervasively sectarian" or whether some of their activities were essentially secular). Cf. *Wisconsin* v. *Yoder*, 406 U.S. 205, 235-236 (1972) (allowing exemption from state compulsory education law under Free Exercise Clause only after detailed scrutiny of particular religion's character and practices); *id.* at 240-241 (White, J., concurring).

Petitioner cites *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), for the proposition that Section 702's exemption should be construed "broadly" in order to avoid constitutional questions about the application of Title VII. Pet. 14-15. The inquiry involved here, however—weighing the religious and secular aspects of an institution to determine whether it qualifies for a religious exemption in the first instance—raises no risk of the kind of ongoing substantial governmental involvement in a religious

institution's operations that concerned this Court in *Catholic Bishop*.[8] See 440 U.S. at 502-504 & n.10.

3. The court of appeals' factual conclusion, see *Tony & Susan Alamo Foundation*, 471 U.S. at 299, that petitioner's purpose and character are "primarily religious" is correct, and does not warrant review by this Court.

The religious component of the Kamehameha Schools' curriculum consists of 15-30 minutes a week of Bible stories, religious songs and prayer for one semester in the elementary grades; one quarter-long course of "largely comparative religious studies" per year in grades 7-9; and mandatory attendance at devotional services every other week in later years. Pet. App. 10a-12a & n.10. The remainder of the school program is non-religious, consisting of "a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective." *Id.* at 10a. More than two-thirds of the on-campus student body is non-Protes-

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[8] Indeed, the Court's decision in *Catholic Bishop* has given rise to an entire line of cases in which the NLRB and the courts of appeals have analyzed precisely the question of whether a particular employer is sufficiently religious in character to qualify for the exemption recognized in that case. See *Volunteers of America, Los Angeles* v. *NLRB*, 777 F.2d 1386, 1389-1390 (9th Cir. 1985); *NLRB* v. *Salvation Army of Massachusetts Dorchester Day Care Center*, 763 F.2d 1, 6 (1st Cir. 1985); *Volunteers of America-Minnesota-Bar-None Boys Ranch* v. *NLRB*, 752 F.2d 345, 348 (8th Cir.), cert. denied, 472 U.S. 1028 (1985); *Denver Post of the Nat'l Soc'y of the Volunteers of America* v. *NLRB*, 732 F.2d 769, 772 (10th Cir. 1984); *St. Elizabeth Community Hospital* v. *NLRB*, 708 F.2d 1436 (9th Cir. 1983); *Tressler Lutheran Home for Children* v. *NLRB*, 677 F.2d 302 (3d Cir. 1982); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981).

tant (C.A. App. 47-48), and petitioner does not seek to convert these students to Protestantism.[9] Pet. App. 9a-10a. Although petitioner requires teachers to state formally that they are Protestants, it does not inquire further into their actual religious beliefs, or into whether and how they might put those beliefs into practice in the classroom. *Ibid.* See also note 3, *supra*; Pet. App. 6a-12a. The court of appeals' conclusion that petitioner is not primarily a religious institution thus finds ample support in the record.[10]

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[9] Petitioner criticizes the court of appeals (Pet. 18) for taking into account the "lack of overt proselytization toward non-Protestant students." While the fact that the schools make no active attempt to convert non-Protestant students is not determinative, it is certainly relevant to whether petitioner should be considered a "religious * * * educational institution" for purposes of exemption from liability under Title VII.

[10] Petitioner's suggestion (Pet. 11) that the Ninth Circuit's approach will cause Kamehameha and similar schools to "completely lose their religious character" is unpersuasive. Requiring petitioner to consider non-Protestants as teachers for secular classes will have no effect whatever on requirements that students attend religious education classes, say grace before meals, pray in the classroom, before athletic or other events and at commencement, or attend religious services. See Pet. 4-5. Nor will application of Title VII prevent petitioner from establishing relevant criteria to ensure that its teachers are equipped to fulfill its stated purpose to "provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women." Pet. App. 2a n.1 (quoting the Bishop will).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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For The Ninth Circuit

BRIEF OF THE HAWAII CONFERENCE OF THE UNITED CHURCH OF CHRIST AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Frederick W. Rohlfing, III, *Ruling threatens quality of Kamehameha Schools*, Honolulu Star-Bulletin, Jul. 30, 1993, A-19..... 3

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BRIEF OF THE HAWAII CONFERENCE OF THE UNITED CHURCH OF CHRIST AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. INTEREST OF AMICUS

The Hawaii Conference of the United Church of Christ ("the Hawaii Conference") has a long-standing relationship with the Kamehameha Schools and a substantial interest in protecting non-profit religious institutions, including schools, from evaluation of their religious sufficiency by the EEOC and the courts.[1]

[1] This *amicus* appears by consent of the parties in accordance with Rule 37.2 of the Rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

The Hawaii Conference, the Hawaii state organization of the United Church of Christ, is composed of island associations which are in turn made up of local churches. The Bishop Memorial Church, which serves as the chapel for the Kamehameha Schools and is located on the campus of the schools, is a member church of the Oahu Association of the United Church of Christ.

This case presents an important question regarding the scope of the exemption afforded by Section 702 of the Civil Rights Act of 1964.[2] The central issue is whether the term "religious educational institution" is to be construed *broadly*, so as to allow independent non-profit religious schools to fulfill their religious purposes freely, or whether it is to be construed *narrowly*, so as to subject religious practices at the schools to intense scrutiny by the EEOC and the courts.

If allowed to stand, the decision of the Ninth Circuit[3] will change forever the character of the Kamehameha Schools and other non-profit religious educational institutions which are, similarly, neither owned nor controlled by a church. Either the Kamehameha Schools will lose their character as a religious educational institution, or they will be forced to display their religious nature in such a way as to be hypocritical and offensive to their Protestant – in this case, Congregational – traditions.

II. BACKGROUND

It was certainly a surprise to the Hawaii Conference, as it was to the Hawaii community, to have the Ninth Circuit say the Kamehameha Schools are not a religious educational institution, especially in view of the public perception of the schools, not to mention the consistent relationship between the schools and the Hawaii Conference over the course of more than a century. And it would have been startling, indeed, to their founder, Princess Bernice Pauahi Bishop.

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[2] 42 U.S.C.A. § 2000e-1(a) (West Supp. 1993).

[3] *EEOC v. Kamehameha Schools*, 990 F.2d 458 (9th Cir. 1993), Pet. App. 1a.

The community reaction to this – to us, astonishing – conclusion is perhaps best mirrored in the July 30, 1993, feature *Viewpoint*, written for the *Honolulu Star-Bulletin* by Frederick W. Rohlfing, III, Esq. (who is neither a graduate of Kamehameha nor a member of a Congregational church). The decision, Mr. Rohlfing says, "has disturbing implications for religious freedom . . . [and] will be the termination of an alternative approach to education that has served the people of Hawaii well for more than a century." *See* Rohlfing, *Ruling threatens quality of Kamehameha Schools*, Honolulu Star-Bulletin, Jul. 30, 1993, at A-19, attached as Appendix A.

The Ninth Circuit's conclusion *is* surprising, but the community reaction is not. The religious nature of the schools is well known in the community, and that issue has been the subject of public action in the past. The Hawaii Supreme Court, whose justices appoint the trustees of the Kamehameha Schools, had no difficulty concluding unanimously that the schools fit easily within the religious organization exemption in Hawaii's own anti-discrimination law. *Murray v. Kobayashi*, 50 Haw. 104, 431 P.2d 940 (1967). Indeed, in 1979, the EEOC itself in a case similar to the present one, classified the schools as a "Religious/Educational Institution," and found no basis for upholding the claim of an applicant refused employment because he was not a Protestant.[4]

Even in the present case the EEOC recognizes the religious nature of the Kamehameha Schools: "It is clear . . . that the schools have a religious orientation that is similar to that found in most church-schools."[5] (One is tempted to ask just how much more is required.)

The Kamehameha Schools have been a Protestant educational institution since their beginning in 1887. They were

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[4] *Puette*, EEOC Determination in Charge No. 091-79-1281 (San Francisco Dist. Off. Dec. 29, 1979).

[5] *Edgerton*, EEOC Determination in Charge No. 370-89-0539 (San Francisco Dist. Off. Dec. 28, 1989), Pet. App. 52a n.8.

founded in the traditions and the spirit of the Congregational Mission, which first brought the Gospel to Hawaii in 1820.

CONGREGATIONALISM[6]

The United Church of Christ is a Protestant religious denomination, Congregational in tradition and history.[7] In the Congregational tradition, local churches are interdependent yet autonomous, Christ is the head of the church, and all members are God's priests (hence "the priesthood of all believers"). Congregationalism stresses freedom of conscience and the independence of each congregation in scriptural interpretation. Although cooperating in local associations and regional conferences and in a national general synod, individual congregations retain the right to govern themselves. Modern Congregationalism began about 1550. Congregationalists were a major political force in the American colonies, settling Plymouth Colony in 1620.

Congregationalists have a long history of involvement in education. They established Harvard College in 1636, Yale in 1701, Dartmouth in 1770, Oberlin in 1833 and many more.

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[6] *See generally* Albertine Loomis, *To All People: A History of the Hawaii Conference of the United Church of Christ* (1970); Marion L. Starkey, *The Congregational Way* (1966); and Gaius Glenn Atkins & Frederick L. Fagley, *History of American Congregationalism* (1942).

[7] Congregationalists have been prominent in the ecumenical movement, and the United Church of Christ is the product of a series of denominational unions and mergers. In this century, in 1931, the Congregational Churches merged with the union of three small groups that all used the name "Christian," and the resulting body became the Congregational Christian Churches. The Evangelical and Reformed Church was formed in 1934 by the union of two American churches of German background. The United Church of Christ was formed June 25, 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States, and the new denomination declared a constitution in force at its Third General Synod on July 4, 1961. The church, which is neither credal nor hierarchical, has about 1.6 million members in the United States, with somewhat smaller followings in Canada, England, Wales, Australia and New Zealand.

The classic Congregational format in founding an institution is to set it up in its own right. Ownership or control of an educational institution is quite foreign to Congregationalism. Just as every local church has the obligation and right of self-determination, so do the educational institutions that are related to the United Church of Christ. The church views its church-school relationship as one of "autonomy and interdependence" and acknowledges that it has more to do with common history, consonance of contemporary mission, and cooperation and partnership than with control or dominance.[8]

PRINCESS BERNICE PAUAHI BISHOP AND HER WILL

Princess Bernice Pauahi was born in 1831, the great granddaughter of Kamehameha I (Kamehameha the Great), who united all the Hawaiian islands. She refused to accept the throne from Kamehameha V, choosing to serve her people rather than to rule them.

The princess, like both her parents, had been raised a Congregationalist. Bernice Pauahi Bishop and her husband, Charles Reid Bishop, were committed members of Kawaiahao Church (a Congregational church, now a member church of the Hawaii Conference), where Mrs. Bishop taught Sunday School and sang in the choir. The Bishop family home, Haleakala, was considered to be "a center of Christian home life." The Friend, Jun. 1948.[9]

Consistent with her strong religious beliefs, Mrs. Bishop provided in her will for the founding of Protestant, non-denominational schools for Hawaiian children. The children were to be taught by Protestant teachers, and the schools were to be administered by Protestant trustees.

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[8] United Church of Christ, Council for Higher Education, *A Statement on Meaning, Purpose, and Standards of the Relationship Among Colleges, Academies and the United Church of Christ*, adopted Nov. 14, 1980.

[9] The Friend is a monthly publication of the Hawaii Conference of the United Church of Christ (and its predecessor organizations).

The will specifically provides that:

> . . . [T]he teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants . . . the selection [of trustees] to be made from persons of the Protestant religion.

The first trustees were a minister, three lay missionaries, and Mr. Bishop.[10] From their inception in 1887, three years after Mrs. Bishop's death, the Kamehameha Schools were intended to transmit Protestant values:

> The wise provisions of the will in regard to moral and religious training are in full accord with the sentiments of the trustees, who hope to carry out such measures and methods as will tend to make good and industrious citizens, interested in maintaining and developing the principles, usages, and institutions of the highest Christian civilization.

Trustees of the Bishop Estate, *The Kamehameha Schools: an Official Prospectus* (Dec. 23, 1885).

THE KAMEHAMEHA SCHOOLS AS A MODEL OF CONGREGATIONAL EDUCATION

That the Kamehameha Schools are Protestant in nature, rather than sectarian, does not make them non-religious. Indeed, non-denominational Protestant education has always

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[10] The lack of any requirement that the trustees be clergy is wholly consistent with the Congregational tradition. Congregationalism envisions that all church members, not just clergy, determine church doctrine and carry out the mission of the denomination. Every member of a United Church of Christ congregation is expected to personally "participate in and extend the ministry of Jesus Christ." The Constitution of the United Church of Christ, Article V, Section 17 (1991 ed.). For example, lay representatives of the local churches comprise at least half the delegates of the General Synod, the national representative body of the United Church of Christ. Bylaws of the United Church of Christ, Article III, Section 171 (1991 ed.).

been a common feature in Congregational schools and colleges. "Both in theory and practice they were non-sectarian; but they were rooted in Congregational soil and they perpetuated the order which created them." Atkins & Fagley, *supra* note 6, at 236. *Accord* Starkey, *supra* note 6, at 283.

And Kamehameha's organization as a trust independent from direct church control is also typical of Congregational schools. Most school systems and colleges formed by Congregational churches are not owned or controlled by either the denomination or the church that created them.[11] Indeed, at their founding, some schools had perceived "no need of formal relationship between the churches and colleges, for the informal relationship was close and intimate." Atkins & Fagley, *supra* note 6, at 237. To this day, the United Church of Christ envisions its formal relationship with schools as a joining of independent bodies in common belief "without dogmatic or ecclesiastical control." Council for Higher Education, *supra* note 8.

The Kamehameha Schools were established as a model of Protestant education. Theodore Richards, principal of the Kamehameha School for Boys from 1893 to 1898, reported in 1899 that, "To leave out the fact that the School has been intensely Christian, without suggestion of denominationalism, and that teachers have been engaged with this thought uppermost . . . would be to leave out the chief feature of the school and the secret of its success." Ethel M. Damon & Josephine Sullivan, *A Historical View of The Kamehameha Schools, Prepared for the Fortieth Anniversary at the Request of President Frank E. Midkiff*, The Friend, Dec. 1928.

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[11] The typical Congregational practice is to found an institution, set it up in its own right, and then set it free. The preservation of the schools' independence is consistent with the Congregational tradition of preserving the autonomy of its member churches: "The church did not dominate the school; rather, it insisted that the freedom which the church demanded for itself should likewise be enjoyed by the school, and the schools were in fact, as well as in name, free schools." Atkins & Fagley, *supra* note 6, at 230, 231.

The religious mission of the schools is not expressed solely through the curriculum; it has always been expressed through the Protestant environment provided to the students.

> A constant endeavor is made to emphasize the moral, the religious, the distinctively Christian life. Sunday Chapel services, daily Chapel exercises, Sunday Schools, Christian Endeavor and similar groups aid in the religious life. Both the boys and the girls have gone out to Hawaiian Churches to serve as teachers.

The Friend, Dec. 1928, *supra*. In a 1975 Self-Study Report, the Kamehameha Schools noted that the strength of their religious program was that:

> The program meets the students "where they are" in their religious struggle and provides support, if necessary, for students making religious decisions.

The Kamehameha Schools High School Division, *Self-Study Report* (1975), Winegar Affidavit, Exhibit 7.5.

The mission and activities of the Kamehameha Schools continue to transmit Protestant values. In announcing guidelines for the accomplishment of the current mission of the Kamehameha Schools, Myron B. Thompson, chairman of the trustees, stated:

> To accomplish this mission, we will:
>
> - Promote the educational development and growth of all people at Kamehameha Schools/Bishop Estate;
>
> - Foster Protestant religious worship, morals and spiritual values . . .

Ha'ilono O Kamehameha (Employee Newsletter of the Kamehameha Schools), Sept. 1993, p. 1.

As outlined above, the history of the Kamehameha Schools reflects the Congregational traditions upon which the schools were founded and according to which they continue to operate. In keeping with their religious heritage, the Kamehameha Schools have always provided a Protestant education to the children under their care. That is what Mrs.

Bishop intended over a century ago, and that is what is still happening today.

III. REASONS FOR GRANTING THE PETITION

A. THE "PRIMARILY RELIGIOUS"/"PRIMARILY SECULAR" TEST INFRINGES UPON THE RIGHT OF A RELIGIOUS EDUCATIONAL INSTITUTION UNDER THE RELIGION CLAUSES TO DEFINE AND CARRY OUT ITS MISSION FREE FROM GOVERNMENT INTRUSION.

This case concerns the definition of the term "religious educational institution" and whether a court may permissibly scrutinize the mission, purpose, character, rituals, and teachings of an institution so as to minimize the religious – as compared with the secular – nature of the institution.

Section 702 provides an exemption for religious educational institutions which allows them to discriminate on the basis of religion. This Court has stated that Section 702 "is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[12]

Section 702 does not define the term "religious educational institution."[13] Although the lower courts have not developed a consensus on the proper interpretation of this term, the Ninth Circuit has now announced a "primarily religious"/"primarily secular" test. This test provides that "[a]ll significant religious and secular characteristics must be weighed to determine whether the [institution's] purpose and character are primarily religious."[14]

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[12] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

[13] 42 U.S.C.A. § 2000e-1(a) (West Supp. 1993).

[14] *EEOC v. Townley Engineering & Manufacturing Company*, 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

In applying the "primarily religious"/"primarily secular" test in this case, the Ninth Circuit did not hold that the Kamehameha Schools are not religious; on the contrary, the court acknowledged that the schools have religious characteristics.[15] Instead, the Ninth Circuit decided that the Kamehameha Schools are not religious *enough*. By whose standards? Not the schools'. Not Mrs. Bishop's. But those of the Ninth Circuit Court of Appeals. This determination clearly violates the Establishment and Free Exercise Clauses because it constitutes government interference with the ability of the schools, as a religious educational institution, to define and carry out their mission.

If the government or the courts are allowed to employ this "primarily religious"/"primarily secular" test, they will (1) scrutinize and monitor the religious activities of religious entities, (2) favor those entities owned or controlled by organized religions, and (3) force independently-run religious schools and other non-profit religious entities to engage only in activities which *appear* religious – and which can easily be characterized as religious – whether or not such activities are consistent with the beliefs and practices of the particular entity.

In this case, the Ninth Circuit emphasized the fact that the Kamehameha Schools do not seek to convert their non-Protestant students to Protestantism, as if that somehow belies

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[15] Among the characteristics acknowledged in the Ninth Circuit's decision are mandatory chapel, mandatory Sunday religious services for boarders, religious instruction, education in comparative religion, daily classroom prayer, grace before meals, publication of Bible verses in the daily bulletin, and prayer before athletic events. See the court's discussion of purposes, faculty, student activities, curriculum, etc. contained in Pet. App. 8a-12a. The court also acknowledged that "[s]ome official school activities have religious overtones." *EEOC v. Kamehameha Schools*, *supra* note 3, Pet. App. 10a. Both the District Court and the EEOC came to a similar conclusion. "It is clear . . . that the schools have a religious orientation that is similar to that found in most church-schools." *Edgerton*, *supra* note 5. *See also EEOC v. Kamehameha Schools*, 780 F. Supp. 1317, 1325 (D. Haw. 1991), Pet. App. 35a.

a religious mission (*EEOC v. Kamehameha Schools*, *supra* note 3, Pet. App. 10a). But it is not the role of the schools to make Protestants, nor is it the role of the court to be telling the schools how to carry out their brand of Protestantism. The role of the schools, as conceived by Mrs. Bishop, is *to inculcate Protestant values*, not to manufacture Protestants. Different people show their religiousness in different ways. That is why we have the First Amendment: to respect and protect those differences.

1. The Ninth Circuit's Test Entangles The EEOC and the Courts in Decisions of a Religious Nature.

The Religion Clauses forbid "programs, whose very nature is apt to entangle the state in details of administration." *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). For this reason, this Court has consistently cautioned the lower courts to interpret statutes in a way that minimizes government's entanglement in the internal operations of religious organizations. *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979).

But the "primarily religious"/"primarily secular" test *requires* just such entanglement because of the difficulty of determining – especially for an outsider – whether the essential nature of an activity is religious or secular:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing entanglement in religious affairs.

Amos, 483 U.S. at 343, Brennan, J., concurring.

The present case illustrates the dangers of such searching analysis. The Ninth Circuit's examination of the religious practices of the Kamehameha Schools and its determination in this case that the practices are "either essentially secular, or

neutral as far as religion is concerned,"[16] is an attempt to define what is religious and what is not.[17]

Whether a school is secular or religious cannot be determined by some method of superficial sorting and classification. On the contrary, religious nature is subtle, implicit, and pervasive; it comes from attitude and character and commitment to tradition reflected in the acts and supervision of those who teach in and operate the school. "That their moral and religious education will also be efficiently cared for needs no better guaranty than the character of the Trustees, and the earnest and able Christian energy of the Principal." The Friend, Dec. 1887, *reprinted in The Beginning*, The Friend, Jun. 1948. To be sure, the two most important safeguards for maintaining the integrity of the mission of a school are the composition of its board of trustees and the composition of its faculty.

Contrary to the Ninth Circuit's assumption, it is not possible – at least in the context of Congregational teachings – to sift out "secular" education from "religious" or to draw a bright line between them. The transmission of Protestant values is the product of the blending of subtle threads that are woven across the broad fabric of the institution. It is not something that can be counted and totalled up like so many sparrows on a fence: "The religious educational program of the Kamehameha Schools . . . includes not only the work directly under the Chaplain, but all character education within the Schools. . . . " Frederic B. Withington, *Bishop Memorial Chapel at the Kamehameha Schools*, The Friend, Dec. 1928.

Thus, where a court or agency attempts to determine the religious nature of a school like Kamehameha, it must engage

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[16] *EEOC v. Kamehameha Schools*, *supra* note 3, Pet. App. 6a.

[17] Judge Noonan observed, writing in dissent in *Townley*: "The agency and court appear to assume that there must be a sharp division between secular activity and religious activity. . . . But of course such a dichotomy is a species of theology. The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time." 859 F.2d at 624-25.

in an analysis of the most intimate aspects of the school and assess how prominent the religious elements are compared to the secular. This type of searching analysis necessarily constitutes the kind of First Amendment intrusion prohibited by *Catholic Bishop*.

Moreover, the government's scrutiny of and entanglement in the affairs of the schools will not end at the termination of this case. If Kamehameha were to lose this case, it would still be bound by the express terms of Mrs. Bishop's will to hire only teachers of the Protestant religion. As a result, Kamehameha would have to make any and all changes necessary to satisfy the Ninth Circuit that it is a religious educational institution and therefore may properly continue to hire only Protestant teachers.[18] The resulting organization would, no doubt, be a religious educational institution. Indeed, it would be a *Ninth Circuit* religious institution. But it would not be a Congregational institution. And it would not be Mrs. Bishop's institution.

Even if the trustees take all these steps, because the Ninth Circuit's opinion places the burden on the Kamehameha Schools to prove their religious nature,[19] Kamehameha will be compelled to continue to demonstrate to the satisfaction of the EEOC that the schools remain religious *enough*. Indeed, will Kamehameha therefore be compelled to ask the EEOC

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[18] In effect, the Ninth Circuit's opinion implies that the schools must formally affiliate themselves with a religion or denomination, hire ordained clergy into administrative positions, convert non-Protestant students to a Protestant denomination, review the religious affiliations of its teachers, rewrite job and curriculum descriptions to advertise the existing Protestant nature of the education currently being offered at Kamehameha, etc.

[19] *EEOC v. Kamehameha Schools, supra* note 3, Pet. App. 4a. Placing this burden of proof on the Kamehameha Schools may in itself be contrary to First Amendment requirements: " . . . [A] considerable burden is on the state, in questioning a claim of a religious nature. Strict or narrow construction of a statutory exemption for religious organizations is not favored." *Larson v. Valente*, 456 U.S. 228, 243 (1982) (quoting *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957)).

for guidance regarding how the schools may be found to be religious *enough* for purposes of Section 702?

This continuing, coercive governmental scrutiny of the exercise of Kamehameha's religious activities conflicts with Section 702's purpose "to minimize governmental interference with the decision-making process in religions." *Amos*, 483 U.S. at 336. The clear weight of First Amendment jurisprudence indicates that a procedure which contemplates "pervasive monitoring" for "the subtle or overt presence of religious matter" is constitutionally suspect. *Aguilar v. Felton*, 473 U.S. 402, 413 (1985). *See also Hernandez v. Commissioner*, 490 U.S. 680, 694 (1989); *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970); *Lemon*, 403 U.S. at 650. Accordingly, the "primarily religious"/"primarily secular" test and the scrutiny it inevitably requires create the sort of entanglement the First Amendment prohibits.

In sum, the "primarily religious"/"primarily secular" test entangles the EEOC and the courts in a determination of whether the religious activities of a religious organization are indeed religious and contemplates that the organization must continue to bear the burden of proving that its activities remain "primarily religious." Until this Court furnishes positive guidance defining the permissible scope of determinations of the religious nature of an independent non-profit school, the EEOC and the courts will continue to intrude upon the internal processes by which a religious school defines its mission.

2. The Ninth Circuit's Test Improperly Discriminates in Favor of Organizations Owned or Controlled by a Church.

The Ninth Circuit suggested that, because the Kamehameha Schools are not "wholly or partially owned by a church" (*EEOC v. Kamehameha Schools, supra* note 3, Pet. App. 7a), they cannot be considered religious *enough* to merit the Section 702 exemption. However, ownership is irrelevant. Like most schools of secondary or higher education formed under Congregational auspices, Kamehameha is a non-profit

independent, non-denominational Protestant organization. It is not owned or controlled by any church and promotes religious tenets common to all Protestants.[20] Indeed, even if the Kamehameha Schools were formally affiliated ("in covenant") with the United Church of Christ, the denomination would still neither own nor control the schools.

The covenant between the United Church of Christ and its affiliated schools envisions "allegiance to freedom of intellectual inquiry without dogmatic or ecclesiastical control." Council for Higher Education, *supra* note 8. *See discussion, supra* note 11. Indeed, even if the Kamehameha Schools were themselves a member *church* of the United Church of Christ, the denomination would still exert no binding doctrinal control over them. Such control would be wholly inconsistent with Congregational tradition: "The autonomy of the Local Church is inherent and modifiable only by its own action." *The Constitution of the United Church of Christ*, Article IV, Section 15.

The presence or absence of formal ties to an organized religion is also irrelevant: "[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Frazee v. Employment Security Dept.*, 489 U.S. 829, 834 (1989) (Frazee's beliefs were recognized as religious despite the fact that he belonged to no formal church and subscribed to no particular tenet of Christianity). Neither may a test operate to the advantage of organized religions over less organized ones: "The clearest command of the Establishment Clause is that one religion cannot be officially preferred over another." *Larson*, 456 U.S. at 244.

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[20] There can be no doubt that Protestantism is a religion for the purposes of Section 702. Even so broad a body of belief as the "Judeo-Christian tradition" is considered "religion" for First Amendment purposes. *See Lee v. Weisman*, 505 U.S. ___, ___, 112 S.Ct. 2649, 2656-57 (1992) (prayers given at school graduation ceremony held to be an establishment of religion even though the prayers were based on nothing more specific than the "Judeo-Christian tradition").

In any event, the issue of ownership or control cannot form the basis for distinguishing religious from secular institutions. So long as the Kamehameha Schools offer an education that continues to reflect their historical Protestant attitudes, character, traditions, and values, the question of who owns or controls the schools is irrelevant.

Mrs. Bishop made religion – in this case Protestantism – a part of the mission of the schools. Kamehameha is no less *religious* than a church that – through its school – has made education part of its mission. To hold otherwise, as the Ninth Circuit seems to have done in this case, is to exalt form over substance, to accord a premium to the accident of ownership or control, rather than to respect an institution for the mission with which it has chosen to define itself.

Until this Court furnishes positive guidance to the lower courts regarding the proper interpretation of Section 702, religious educational institutions that are not owned or controlled by a church or that do not have "extremely close ties" to organized religion will suffer a burden which other religious educational institutions need not bear.[21]

3. Continued Application of the Ninth Circuit's Test Will Force Religious Organizations to Tailor Their Activities to the Standards of the Court Rather Than to Their Own Religious Needs.

The "primarily religious"/"primarily secular" test envisions that "each case must turn on its own facts." *Townley*, 859 F.2d at 618. This sort of case-by-case analysis gives rise to a significant "danger of chilling religious activity." *Amos*, 483 U.S. at 344 (Brennan, J., concurring). Under the Ninth Circuit's test, every time a complainant is denied employment

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[21] Moreover, as discussed on page 11 of the petition, the Ninth Circuit's decision in the present case essentially nullifies Section 702's "religious educational institution" exemption by limiting it to schools already covered by Section 703 of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(e)(2) (West 1981), i.e., those owned or controlled by a church.

at a religious school on the basis of the applicant's religion, the EEOC must scrutinize the school's records to ascertain whether the school's religious practices are *sufficiently* religious to outweigh its secular aspects. A religious educational institution risks losing its exempt status at some undefinable point at which the EEOC or a court determines that the "general picture" (*EEOC v. Kamehameha Schools, supra* note 3, Pet. App. 5a) of the school turns from primarily religious to primarily secular.[22]

A religious educational institution wishing to avail itself of Section 702 would therefore be compelled to *appear* as "religious" as possible:

> While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there can be no genuine dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well.

Amos, 483 U.S. at 343-44 (Brennan, J., concurring).

> Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and its sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Amos, 483 U.S. at 336 (Opinion of the Court).

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[22] A religious institution may discontinue its religious activity and thereby lose its religious character for Section 702 purposes. *Fike v. United Methodist Children's Home*, 547 F. Supp. 286, 289-290 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983). By contrast, the "primarily religious"/"primarily secular" test may characterize an institution as "secular" even if it still engages in religious activity.

Continued use of the "primarily religious"/"primarily secular" test would force non-profit entities like the Kamehameha Schools to exaggerate the outward manifestation of their religious nature in order to avoid or prevail in litigation.[23] Any such exaction would in effect dictate which practices constitute religion and which do not and would force the non-profit organization to adopt practices a federal court would consider "religious."[24] Faiths which prefer subtler means of transmitting their beliefs would find this requirement particularly indigestible. In *Fowler*, this court recognized that the protection of the Free Exercise Clause extends to a sect whose "religious service is less ritualistic, more unorthodox, less formal than some." 345 U.S. at 69.

The very nature of Congregationalism makes it suspect under the Ninth Circuit's laundry-list approach. The Congregational tradition grew out of the austere Calvinist-Puritan tradition. "The devout Pilgrims and Puritans of the first days . . . needed no colorful ritual, no adornments in the plain meetinghouses where they worshiped [sic]." Starkey, *supra* note 6, at 6. A school founded in the Congregational tradition necessarily achieves its ends through subtle and implicit means. A requirement that the school prominently advertise its religious nature through overt action or blunt language tailored to the myopic senses of the bureaucrat would most certainly offend the Congregational notion of an impact on the community which is "constructive and meaningful, withal gentle and restrained." *The Future*, The Friend, Jun. 1948.

The "primarily religious"/"primarily secular" test will force religious institutions to advertise their religious nature for the benefit of a bureaucracy or a court and not in response

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[23] "Such establishment, such forcing of a governmentally chosen form upon religious activity, is incompatible with the Religion Clauses." *Townley*, 859 F.2d at 623 (Noonan, J., dissenting), (in reference to a case where Massachusetts attempted to force Baptists to incorporate under state law).

[24] "[I]t is no business of the courts to say what is a religious practice or activity for one group is not religion." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

to their own religious beliefs. Unless this Court gives positive guidance concerning the proper interpretation of Section 702, the EEOC and the courts will improperly influence – indeed, dictate – religious activity in religious educational institutions.

B. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO RESOLVE A CONFLICT IN THE CIRCUITS

In contrast to the *narrow* reading the Ninth Circuit accorded it in this case, the Third and Fifth Circuits have both held plainly that Section 702 should be construed *broadly*. (*See discussion* Pet. 12-15.)

This Court should grant certiorari in order to resolve this conflict in the circuits and in order to prevent the Kamehameha Schools from having to abandon the central component of the institutional character they have maintained for over a century.[25]

The preservation of the schools' religious mission and the fortunes of the youngsters who come hereafter should not be the product of some accident of geography.

IV. CONCLUSION

Over a century ago, Princess Bernice Pauahi Bishop prescribed a religious mission for the Kamehameha Schools. The right to define that religious mission and to determine how to implement it is the inherent business of the schools.

Mrs. Bishop would indeed be appalled at the suggestion that the schools she founded are not a religious educational institution. They are religious in just the way she wanted them to be: Protestant, in the classic Congregational tradition in

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[25] Whether Kamehameha is a religious educational institution is an issue that should receive the attention of this Court before, rather than after, an institution as venerable as Kamehameha is compelled to transform itself. *Cf. Virginia Military Institute v. United States*, ___ U.S. ___, 113 S.Ct. 2431 (1993) (opinion of Justice Scalia respecting the denial of a petition for writ of certiorari).

which she grew up. She had a right to define their religious mission as she chose then, just as the trustees have an obligation to maintain that mission today.

And the First Amendment protects both such efforts.

For the foregoing reasons, this *amicus*, the Hawaii Conference of the United Church of Christ, respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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October 15, 1993

APPENDIX A

Frederick W. Rohlfing III, *Ruling threatens quality of Kamehameha Schools*, Honolulu Star-Bulletin, Jul. 30, 1993, at A-19.

A recent Ninth Circuit Court of Appeals decision directing the Kamehameha Schools to end their Protestant-only hiring policy for teachers has disturbing implications for religious freedom. The effect of the court's ruling will be the termination of an alternative approach to education that has served the people of Hawaii well for more than a century. More generally, the court's decision will result in an unwarranted entanglement of government in religious matters.

In establishing the policy of hiring only Protestant teachers at the Kamehameha Schools, Princess Bernice Pauahi Bishop sought to provide students with, as stated in her will, a means for "instruction in morals and in such useful knowledge as may tend to make good and industrious men and women."

The issue before the Ninth Circuit was whether this policy of hiring only Protestants as teachers fell within a federal civil rights law exemption accorded to religious educational institutions in "employment of individuals of a particular religion to perform work connected with the carrying on by such" educational institutions of their activities.

The Ninth Circuit ruled that the schools were not covered by the exemption, and therefore can no longer hire only Protestants as teachers, because "the general picture of the schools reflects a primarily secular rather

than a primarily religious orientation." The court made this ruling despite its acknowledgment that the schools:

- Have a chaplain who teaches religious education at the schools and who serves as pastor of the Bishop Memorial Church, located on campus in a structure owned by the schools;

- Have teachers in kindergarten through eighth-grade lead their classes in daily prayer;

- Have all boarding students say grace before dinner and athletic teams pray before games;

- Require all boarders to attend services held every Sunday during the school year at the Bishop Memorial Church; and

- Require each student to fulfill a religious education requirement.

Kamehameha Schools takes a moderate approach to religious instruction – and it was ironically this very moderation that the Ninth Circuit used to find Kamehameha Schools outside of the circle of educational institutions exempt from the civil rights law forbidding employment decisions based upon religion. In its decision, the court cited what it called "secular characteristics" of the schools, which it said included:

- The schools not being controlled or supported by a religious organization and not being affiliated with any specific denomination of Protestants;

- The supposed failure of the schools to neither require "teachers to maintain active membership in a church," nor to "inquire into the substance of a teacher's

beliefs or the extent to which teachers integrate those beliefs into their work;"

- The fact that "less than one-third of the 'on-campus' students are Protestants;"

- The schools' disavowal of "any effort to convert non-Protestant students."

Most disturbingly, the Ninth Circuit has put itself in the position of deciding just what constitutes "religious practices." Justice William O. Brennan [sic], one of the U.S. Supreme Court's greatest advocates of civil liberties, went on record opposing the approach now adopted by the Ninth Circuit to determine whether the religious exemption to the civil rights law applies to an institution's employment decisions.

In the case Corporation of the Presiding Bishopric [sic] vs. Amos, a 1986 decision, the high court upheld the right of a church to dismiss an employee of a gymnasium owned by the church because the employee had failed to meet the church's religious criteria. Brennan agreed with the majority decision in Amos finding the church exempted from the 1964 Civil Rights Act.

In his concurrence, Brennan explained that while he opposed religious organizations giving preference based upon religious standards in what he would consider secular work, he saw a much greater danger in courts becoming involved in distinguishing between secular and religious work. He voiced concern that the application of a religious-secular distinction by courts would require a "searching case-by-case analysis" that would lead to

"considerable ongoing government entanglement in religious affairs."

He pointed out that a religious organization, in order to avoid litigation, would then "have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing others tasks as well." As a result, Brennan said, the religious "community's process of self-definition would be shaped in part by the prospects of litigation."

A review of the Ninth Circuit's decision regarding Kamehameha Schools shows that Brennan's fears were justified. By its own admission, the court found it necessary to conduct a wide-ranging inquiry into the religious orientation of Kamehameha Schools in order to decide whether it was a secular or religious institution. In approving governmental inquiry into the religiousity [sic] of the schools, the Ninth Circuit ignored the free-exercise-of-religion clause of the U.S. Constitution.

Justice Brennan's concurrence in Amos provides a highly workable framework for courts in cases where a potential infringement of religious freedom exists. He said simply that the non-profit status of an organization gives it credibility when it asserts that its activities are "infused with a religious purpose." The absence of a profit motive should be sufficient evidence of a religious orientation to make an institution exempt from undue legal interference. Justice Brennan therefore concluded that nonprofit organizations claiming a religious dimension should have a categorical exemption from the general prohibition of religious discrimination in employment.

The Princess endowed the Kamehameha Schools in order to provide a first-rate education to children of native Hawaiian ancestry, and to transmit the religious values she held dear to succeeding generations. The exercise of that legacy certainly falls within any reasonable definition of religious freedom – yet the hiring practices specified in her will, practices that have served Hawaii's community well for generations, are now forbidden, according to the Ninth Circuit.

It should be the earnest hope of all who value the religious freedom protected by the Bill of Rights that the Ninth Circuit's unwise decision will be reversed by the U. S. Supreme Court.

Frederick W. Rohlfing III is a partner in the Honolulu law firm of Stubenberg & Durrett. Stubenberg & Durrett represents several non-profit religious and educational institutions as part of its practice.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The EEOC's opposition is striking primarily for what it does not dispute. In its petition, petitioner Kamehameha Schools/Bishop Estate ("Kamehameha" or "the Schools") argued first that there was an unquestioned conflict among the circuits on the threshold question of whether Section 702 of the Civil Rights Act should be interpreted broadly to accommodate religious prerogatives or narrowly to advance antidiscrimination norms. This is not disputed by the EEOC, which responds only by attacking a strawman and ignoring Kamehameha's argument. The EEOC merely argues that the precise language exempting "religious . . . educational institutions" has not spawned a conflict in the circuits. That is true, but leaves unspoken what is critical, *viz.*, the threshold question of how to resolve close cases under Section 702 is an important issue that the Ninth Circuit has resolved contrary to the holdings in two other circuits.

The second basis for granting the petition is that the Ninth Circuit's test—*i.e.*, the requirement that an institution

be found to be "*primarily* religious" by a federal court in order to avail itself of Section 702's exemption for "religious . . . educational institutions"—warrants review because it (a) entails an unnecessarily entangling, intrusive governmental inquiry into religious matters, and (b) will have a potentially devastating impact on educational institutions that are not owned by a religious body. Pet. 11, 15-19. Again, the EEOC does not dispute what is confirmed by the briefs of *amici curiae* filed in support of the petition, *i.e.*, that the decision below threatens to remove from Section 702's protective umbrella hundreds of religious schools and colleges that are not owned by a church or religious group, and thereby threatens their religious character. Instead, the EEOC observes that *some* kind of inquiry is inevitable in applying Section 702, and on that basis leaps to the unjustified conclusion that this Court should simply ignore the highly intrusive and entangling inquiry required by the Ninth Circuit. Opp. 10-12.

Finally, the EEOC does not dispute that the EEOC now interprets Section 702 in a manner that deprives that exemption of any significance, independent of Section 703(e)(2), the separate exemption accorded to church-owned schools. The Ninth Circuit's seeming endorsement of this position, combined with the EEOC's nationwide enforcement authority, make the issue presented a matter of great significance for hundreds of religious schools that are not owned by a religious body. For these and other reasons set forth below, the opposition ultimately does nothing more than underscore the need for review by this Court.

1. The EEOC first argues that there is no conflict involving the precise phrase in Section 702 exempting "religious . . . educational institutions." Opp. 7. But this argument is beside the point, because Kamehameha has never claimed such a narrow conflict. See Pet. 14.

Rather, Kamehameha's petition demonstrates a conflict among the circuits on the important, preliminary question

of the proper rule of construction for all of Section 702's religious exemptions. Both the Third Circuit, in *Little* v. *Wuerl*, 929 F.2d 944 (3d Cir. 1991), and the Fifth Circuit, in *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981), squarely held that "Section 702 . . . must be construed broadly." 626 F.2d at 487; see also 929 F.2d at 951 ("we read the exemption broadly"). The Ninth Circuit, by contrast, squarely held below that Section 702 must be construed "narrowly." Pet. App. 4a. The EEOC does not dispute that, in this respect, the Ninth Circuit's decision directly conflicts with *Little* and *Mississippi College*, or that the result in this case would have been very different if it had been decided by the Third or Fifth Circuit.

Most important, the EEOC does not dispute that this fundamental conflict provides a sufficient reason for review. Indeed, this Court's decisions make clear that this kind of conflict—*i.e.*, a conflict on a question of interpretive methodology—routinely provides the sole basis for review by this Court. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *NLRB*, 463 U.S. 147, 152 (1983) (granting certiorari because of conflict between an "expansive" and "a narrow reading" of provision of NLRA).[1] In sum, the EEOC does not and cannot dispute one of the two principal bases on which Kamehameha has sought review by this Court: the conflict among the circuits over the appropriate rule of construction to apply in interpreting Section 702.

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[1] *Accord, e.g.*, *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 846 (1974) (granting certiorari because of "an apparent conflict in approach" between two circuits, even though it would have been possible to reconcile the outcomes in both cases); *see also Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 764 (1985) ("[b]ecause the Court of Appeals' decision appeared to conflict in principle with the decision of the Eighth Circuit, . . . we granted certiorari"); *Ivan Allen Co.* v. *United States*, 422 U.S. 617, 623-24 (1975) (granting certiorari because of "conflict in principle" and importance of issue).

2. The EEOC likewise offers no persuasive response to Kamehameha's explanation of the importance of the issues presented in this case. As explained in the petition, the Ninth Circuit's requirement that an institution be found to be "*primarily* religious" to come within Section 702 threatens to subject hundreds of religious schools and colleges that are not owned by a church or religious group to Title VII's strict ban on religiously based employment practices. Pet. 4, 11-12, 15-19. The EEOC does not dispute this critical conclusion, which is overwhelmingly confirmed by the *amicus curiae* briefs filed in this case on behalf of a wide variety of religious schools and other organizations, including the Baptist Church, evangelical Christian denominations, the Catholic Church, the Episcopal Church, the Lutheran Church, and the Seventh-day Adventist Church. See *Amicus* Br. of Christian Legal Society, *et al.*, 2, 7-12; *Amicus* Br. of Council on Religious Freedom, *et al.*

These briefs demonstrate that if Kamehameha cannot claim a religious exemption under Section 702, numerous similarly situated educational institutions are at risk as well, including (for example) the University of Notre Dame, Valparaiso University, Wheaton College, and hundreds of Christian and Hebrew secondary schools. See *Amicus* Br. of Christian Legal Society, *et al.*, 2-10 (citing additional examples).[2] Indeed, insofar as their religious character

[2] Although most organizations do not keep statistics on the number of schools that, like the Kamehameha Schools, are not owned or controlled by a church or other religious group, the groups that do keep such statistics have provided the following information. The Association of Christian Schools International states that 505 of its 2700 constituent schools (almost 20 percent) fall into this category, as do 47 (five percent) of the American Association of Christian Schools' 850 schools. Further, a 1988 study by the Jewish Educational Society of North America found that nearly 600 of approximately 2360 Jewish communal day and afternoon schools (twenty-five percent) were neither owned nor controlled by a synagogue. *Hebrew University Institute of Contemporary Jewry Project for Jewish Educational Statistics 1986-87* (JESNA 1988).

is concerned, these schools are very similar to Kamehameha, which, as the EEOC itself conceded below, has a " 'religious orientation similar to that found in most church-schools.' " Pet. App. 43a; see also *id.* at 52a n.8. The *amicus* briefs further confirm that the Ninth Circuit's intrusive, entangling "primarily religious/primarily secular" test threatens to undermine fundamentally the religious character of these institutions, as well as a number of religious publications. *Amicus* Br. of Christian Legal Society, *et al.*, 10-12.

Aside from its frivolous waiver argument,[3] the EEOC's principal response to these concerns is to claim that the Ninth Circuit's deeply intrusive test is somehow justified by the fact that a court must "conduct *some* inquiry into whether the employer is a 'religious' organization." Opp. 10 n.7 (emphasis in original). This is a *non sequitur*.

Indeed, the Ninth Circuit's approach goes well beyond any inquiry that would be necessary or appropriate to determine whether a non-profit[4] school is "religious"

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[3] Kamehameha is plainly entitled to challenge the propriety of the Ninth Circuit's "primarily religious/primarily secular" test because that issue was "passed upon" by the Ninth Circuit itself. *See United States* v. *Williams*, 112 S. Ct. 1735, 1738-39 (1992) (review of an issue is permitted "so long as it has been passed upon"). The court of appeals did not make a "routine restatement and application of settled law," *Illinois* v. *Gates*, 462 U.S. 213, 222-33 (1983), but instead, examined the legislative history of Section 702 closely, and concluded—incorrectly—that there was no reason "to question the approach . . . adopted in *Townley*." Pet. App. 6a n.5.

In any event, Kamehameha's petition for rehearing before the Ninth Circuit plainly raised the entanglement concerns implicated by the Ninth Circuit's holding: Citing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), Kamehameha asserted that the Ninth Circuit's approach amounted to "religious policing" because "[i]ts tests actually enter into the domain of the religious beliefs and practices themselves." Pet. for Reh. 13.

[4] Like virtually all religious schools, Kamehameha operates on a non-profit basis. Pet. App. 36a. Kamehameha limits its arguments in its petition and here to such non-profit religious entities. *Com-*

within the common, ordinary meaning of that term. Used as an adjective, "religious" means "manifesting religion," *Webster's II New Riverside University Dictionary* 1918 (1984), or "exemplifying the influence of religion." *Webster's Third New International Dictionary* 993 (1971). Thus, a school would be considered "religious" in ordinary parlance if there were at least a bona fide element of religion observable in the institution's purposes and practices. The EEOC itself was obviously using the term in this sense when it concluded, as noted above, that the Kamehameha Schools have a " 'religious orientation similar to that found in most church-owned schools.' " Pet. App. 43a; see also *id.* at 52a n.8. Such a limited, common-sense inquiry would not present the entanglement and other concerns discussed by Kamehameha and its *amici*.

By contrast, as explained at greater length in the petition (at 16-18), the Ninth Circuit's "primarily religious/primarily secular" test is significantly more intrusive for two reasons. First, the court must examine not only those characteristics that give an institution its "religious" flavor, but *all* of an institution's "significant . . . characteristics," in order to determine whether each such characteristic is "religious" or "secular." Pet. App. 5a. Second, the Ninth Circuit's approach requires that all of these characteristics " 'must be weighed to determine whether the [school's] purpose and character are *primarily* religious' " or secular. *Id.* (emphasis added). Thus, at two levels, the EEOC or a federal court must make intrusive judgments about what characteristics and practices are "religious" and how important those characteristics and practices are in the context of a religious institution.

The dangers of this intrusive and value-laden inquiry are illustrated in this case. Here, the EEOC and the Ninth Circuit have cited the absence of overt proselytization as a "secular" characteristic (see Pet. App. 10a; Opp.

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pare EEOC v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (denying Section 702 exemption to a for-profit manufacturing company), *cert. denied*, 489 U.S. 1077 (1989).

13 & n.9), even though the Congregationalist faith that animates the Kamehameha Schools is a religion that prefers to "achieve[] its ends through subtle and implicit means." *Amicus* Br. of Hawaii Conference of United Church of Christ 18. Similarly, the EEOC relies on nothing other than its *own* view about what is "religious" and how a religious institution should be run when it summarily rejects as "unpersuasive" Kamehameha's conviction that the Ninth Circuit's approach will cause Kamehameha and schools like it to " 'lose their religious character.' " Opp. 13 n.10. *Cf.* EEOC Ct. App. Br. 31 n.15 (suggesting it would be appropriate to have "prayer conducted over the public address system" at Kamehameha, rather than require all teachers to lead prayer). Such intrusive, inappropriate judgments would be unnecessary under a more common-sense interpretation of Section 702.[5]

The EEOC also dismisses the practical concerns of Kamehameha and its *amici* by claiming, without analysis, that "[t]he inquiry involved here . . . raises no risk of the kind of ongoing substantial governmental involvement in a religious institution's operations that concerned this Court in *Catholic Bishop*." Opp. 11-12 (footnote omitted).[6] This is not so. If the Ninth Circuit's de-

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[5] The EEOC protests that review of the Ninth Circuit's decision is not warranted because Kamehameha, in its petition, "suggest[ed] no more appropriate methodology [than the "primarily religious/primarily secular" test], and none occurs to [EEOC]." Opp. 10. Putting aside how much energy the EEOC may have expended in its effort to formulate an alternative approach, the argument is irrelevant at the *certiorari* stage. And, although Kamehameha has set forth some suggestions for a less entangling inquiry, it is certainly not incumbent upon Kamehameha to present, at this stage, a fully elaborated scheme for properly interpreting and applying Section 702.

[6] In *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), several religious schools claimed they were not required to comply with collective bargaining provisions of the National Labor Relations Act because of their religious character. Although the statute at issue did not contain an exemption for religious organizations, the Court

cision stands, Kamehameha (and schools like it) will have two choices: either abandon their religious mission altogether, or attempt to become even more "religious" in the hope of eventually passing muster under the Ninth Circuit's stringent test. See *Amicus* Br. of Hawaii Conference of United Church of Christ 13. If Kamehameha opts to follow the latter course, it can expect further lawsuits and further intrusive inquiries by the EEOC and the federal courts. See *id.* at 16-17.

The inquiry mandated by the Ninth Circuit is therefore not qualitatively different from that denounced in *Catholic Bishop*:[7] It impermissibly places on Kamehameha and schools like it the "significant burden . . . [of being required], on pain of substantial liability, to pre-

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prohibited the NLRB from conducting an annual investigation to determine whether the schools were " 'completely religious, not just religiously associated,' " *id.* at 493 (citation omitted), emphasizing that "[i]t is not only the conclusions that may be reached by the [NLRB] which may impinge on rights guaranteed by the Religion Clauses, but also the *very process of inquiry* leading to findings and conclusions." *Id.* at 502 (emphasis added) (footnote omitted). This conclusion applies even more strongly in this case, because Congress has determined expressly that a religious exemption is appropriate.

[7] The EEOC is simply wrong in claiming that this Court has previously approved "inquiries similar to that undertaken by the court of appeals in this case." Opp. 10-11. In *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), for example, the Court did not authorize scrutiny by lower courts of the *religious* aspects of the religious foundation claiming an exemption from the Fair Labor Standards Act ("FLSA"). Rather, the Court's holding approved only the review of for-profit *businesses* run by the foundation, and concluded that the fact that they "serve[d] the general public, in competition with other private entrepreneurs," rendered the foundation subject to the FLSA. *Donovan* v. *Tony & Susan Alamo Found.*, 722 F.2d 397, 400 (8th Cir. 1984), *cited in* 471 U.S. at 299. The other case cited by the EEOC, *Roemer* v. *Board of Public Works*, 426 U.S. 736, 755-61 (1976) (plurality opinion), is inapposite because it involved state aid to religious colleges and universities, to be used solely for "non-sectarian" purposes. Here, by contrast, all Kamehameha sought was to be left alone to impart religious principles to its students as it saw fit.

dict which of its activities a secular court will consider religious." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987). This, we submit, is a classic case of entanglement.

3. Finally, the EEOC's position before this Court and the lower courts, combined with the EEOC's nationwide enforcement authority, underscore the importance of immediate review by this Court. As explained in the petition (at 7), the EEOC has previously claimed that Section 702 has no significance independent of the separate exemption (for church-owned schools) provided in Section 703. Indeed, in the district court, the EEOC argued explicitly that Kamehameha could not claim protection under Section 702 because it "does not fit within the definition specifically provided by Congress for a 'religious educational institution' in [Section] 703(e)(2)." EEOC D. Ct. Br. 29. The EEOC's opposition is significant because, despite the opportunity to revise or clarify its views on the scope of Section 702 and its enforcement policies, the agency refuses to retreat one inch from the extreme position it took below.

Although the Ninth Circuit's decision does not expressly endorse the EEOC's position, its effect is to leave the EEOC free to press its avowed policy of denying the Section 702 exemption to all non-church-owned schools. The threat of challenge by the EEOC will be sufficient to force many religious schools to alter their fundamental religious character. This Court should not grant the EEOC nationwide license effectively to deprive dozens of religious schools of the protection of Section 702 simply because those schools cannot afford to litigate an issue ripe for review by this Court or because they do not want to bear the burden of satisfying "Caesar" that their internal operations and policies are sufficiently "religious." [8]

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[8] The EEOC further claims that the Ninth Circuit was correct in concluding that the Schools' "purpose and character are [not] [sic]

* * * *

In sum, this Court should grant certiorari (1) to resolve the conflict between the Ninth Circuit and the Third and Fifth Circuits regarding the proper rule of construction to apply in interpreting Section 702; (2) to protect hundreds of religious but non-church-owned educational institutions from the kind of inappropriate, entangling, and potentially destructive governmental inquiries mandated by the Ninth Circuit's approach; and (3) to protect these institutions from the EEOC's crabbed view of the scope of the exemptions embodied in Section 702.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Kamehameha Schools' petition for a writ of certiorari, this Court should grant the petition.

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'primarily religious.' " Opp. 12. Because the petition challenges the Ninth Circuit's test itself, the EEOC's view as to the proper outcome under that test is irrelevant.